In the

Supreme Court of the United States

October Term, 1936

No. 365

THE ASSOCIATED PRESS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

BRIEF ON BEHALF OF PETITIONER, THE ASSOCIATED PRESS

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IN THE

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THE ASSOCIATED PRESS, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 365

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF THE ASSOCIATED PRESS

Opinion Below

National Labor Relations Board v. *Associated Press*, 85 F. (2) 56 (R. 436-445).

Jurisdiction

Certiorari was granted on October 26, 1936, under Judicial Code Section 240(a), as amended by the Act of February 13, 1925 (c. 229 S. 1, 43 Stat. 938; 28 U. S. C. A. Section 347(a)).

Questions Presented

The question presented is the constitutionality of the National Labor Relations Act of July 5, 1935 (Pub. No. 198, 74th Congress; 49 Stat. 449; 29 U. S. C. A. Section 151).

The case comes down to this. An editorial worker in a New York office is discharged, the reason given by the officer responsible being that his work is not up to his proven capability (R. 251). Enter the National Labor Relations Board; and after hearing the aggrieved employee, they conclude that those whose duty it was to criticize his work were disingenuous about it and that the discharge was in fact provoked by his union activities in connection with the American Newspaper Guild—in which, be it noted, he had been openly engaged without disturbance for over two years (R. 249, 194-199). They make an order compelling his reemployment in his former position with pay during his absence; which the Circuit Court of Appeals, upon the petition of the Board, grants an order to enforce.

In what possible connotation of the term can this be called a regulation of commerce between the States? From what hidden source can the Federal Government derive the power to compel a private employer to retain an employee in his local office whose services he no longer desires?

Statute Involved

The statute involved, the National Labor Relations Act, is set forth in full in Appendix A, *infra*.

The avowed purpose of the Act* is that of reenacting, elaborating, clarifying, and, if possible, more effectively enforcing, the principle of "collective bargaining" and freedom

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*See House Committee Report No. 1147, 74th Cong. 1st Sess. (June 10, 1935) on S. 1958; House Committee Report No. 972, 74th Cong. 1st Sess. (May 11, 1935) on S. 1958; Senate Committee Report No. 573, 74th Cong. 1st Sess. (May 1, 1935) on S. 1958.

of organization of employees, which was first universally proclaimed and sought to be enforced in Section 7(a) of the National Industrial Recovery Act of June 16, 1933 (c. 90, 48 Stat. 195, 198; 15 U. S. C. 707(a)). In substance the Act seeks (1) to guarantee to all employees (with few exceptions) the right to bargain collectively in respect of hours, wages and conditions of employment and (2) to prevent employers from interfering in any way with the exercise of this right, in so far, at least, as such interference is one "affecting commerce" within the meaning of Section 2(7) of the Act. This section defines "affecting commerce" as meaning "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led *or tending to lead to a labor dispute** burdening or obstructing commerce or the free flow of commerce." "Commerce" means, of course, interstate or foreign commerce (Section 2 (6)).

Section 7 declares that:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Not content, however, with this general declaration** Section 8 of the Act expressly provides that:

> "It shall be an unfair labor practice for an *employer*"—
>
> (1) "To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

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* Italics ours unless otherwise noted.

** Almost identical with the declaration required by Section 7(a) of the N.I.R.A. to be contained in all codes promulgated pursuant to the N.I.R.A.

(2) "To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *."

(3) "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That *nothing* in this Act, * * * [or in other statutes] shall preclude an employer from making an agreement with *a labor organization* (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) *to require as a condition of employment membership therein,* if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made."

(4) "To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."

(5) "To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

For the purpose of preventing employers from engaging in any of the "unfair labor practices" (as described in this Section 8) "affecting commerce", the Board created by the Act is, by Section 10, given the exclusive power to investigate charges that "any person has engaged in or is engaging in any such unfair labor practice, * * * to issue and cause to be served upon such person a complaint stating the charges in that respect" (Section 10(b)), and, after notice and hearing, to "issue and cause to be served on such person an order requir-

ing such person to cease and desist from such unfair labor practice, and *to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.* Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order." (Section 10(c)). The Board is given the power to petition the proper Circuit Court of Appeals "for the enforcement of such order" and "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." (Section 10(e)).

Statement of the Case

On October 18, 1935, The Associated Press (frequently referred to herein as the AP) discharged one Morris Watson, an editorial employee in its New York office, engaged exclusively in obtaining, composing, writing and editing various items of news (R. 186). The reason given Watson for his discharge, *according to his own testimony before the Board,* was "because we are dissatisfied with your work, you are dissatisfied with us, and I am convinced that you will be happier elsewhere" (R. 234), and, as the files of The Associated Press show, Mr. Kent Cooper, the General Manager, authorized Watson's discharge "but *solely* on grounds of his work not being on a basis for which he has shown capability" (R. 251).

On November 7, 1935, the American Newspaper Guild, a labor organization, filed charges with the National Labor Relations Board against The Associated Press, alleging that in discharging Watson the AP had violated the rights of employees guaranteed in Section 7 of the National Labor Relations Act, and had engaged in unfair labor practices in contravention of Section 8, subdivisions (1) and (3) of said

Act (R. 10-11). Thereupon, on December 4, 1935, a complaint was served by the Board on the AP alleging that in discharging and refusing to reinstate said Watson, the AP had engaged in unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1) and (3) and Section 2, subdivisions (6) and (7) of the National Labor Relations Act (R. 12-15). The Associated Press by answer admitted the discharge of Watson but denied that the discharge was due to the fact that Watson had joined or assisted the Guild or had otherwise engaged in union activities, and further denied, on constitutional grounds, that the Act was valid or that the Board had any jurisdiction in the premises (R. 16-21).

Hearings on the complaint were held (in conjunction with a related proceeding*) before a Trial Examiner designated by the Board (R. 49, 417). The AP moved to dismiss the complaint on constitutional grounds. Its motion was denied and it withdrew (R. 29, 48-54, 417-418). After further proceedings in which The Associated Press did not participate except to offer the Board the services of its Assistant General Manager as a witness on the question of the nature of the AP, its business and its relation, if any, to interstate commerce (R. 29, 54, 180, 182, 437), the Trial Examiner recommended that The Associated Press be compelled (1) to reinstate Watson and pay his lost wages and (2) to "cease and desist from refusing to bargain collectively with the American Newspaper Guild", to "bargain collectively with its editorial employees through the American Newspaper Guild and its National Executive Board, duly chosen representa-

* The other proceeding was in accordance with a petition of the American Newspaper Guild (R. 268-269), held pursuant to Section 9(c) of the Act for the purpose of determining whether or not the Guild was, as it claimed to be, the exclusive representative of the editorial employees in the New York office, for the purpose of collective bargaining.

tive of The Associated Press unit of such Guild", and to "file with the Labor Board Director for the Second Region a report in writing setting forth in detail the manner and form in which it has complied with the foregoing requirements" (R. 44-45).

The Board confirmed the recommendation of the Trial Examiner in part* and ordered The Associated Press to (R. 432-433):

> "1. Cease and desist:
>
> (a) From discouraging membership in the American Newspaper Guild or in any other labor organization of its employees, by discharging, threatening to discharge, or refusing to reinstate any of its employees for joining the Guild or any other labor organization of its employees; and
>
> (b) From in any other manner discriminating against any of its employees in regard to hire or tenure of employment or any term or condition of employment for joining the Guild or any other labor organization of its employees; and
>
> (c) From in any other manner interfering with, restraining, or coercing its employees in the exer-

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* In regard to the Trial Examiner's recommendation as to collective bargaining, the Board stated (R. 418, footnote):

> "Since the complaint did not charge respondent with failure to bargain collectively, we shall make no order with respect thereto."

As a matter of fact, there was no proof that the Guild represented a majority of the AP editorial employees in the New York office. The Board has subsequently found that the Guild is the *exclusive* representative of *all* such editorial employees because a majority of those *who voted* in an election held by the Board under Section 9(c) of the Act (but *not* a majority of *all* the editorial employees in the New York office) chose the Guild as their representative (see Board's Decision No. 58 in Case No. R-26, dated July 3, 1936). It may be safely assumed, therefore, that, whether or not the Board follows the remainder of the Trial Examiner's recommendation and seeks to affirmatively *compel* the AP to bargain collectively with the Guild, depends entirely on the outcome of the case at bar.

cise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Morris Watson immediate and full reinstatement to his former position, without prejudice to any rights and privileges previously enjoyed by him.

(b) Make whole said Morris Watson for any loss of pay he has suffered by reason of his discharge, by payment to him of a sum of money equal to that which he would normally have earned from the date of his discharge to the date of offer of reinstatement, computed at the rate of $295 per month, less the amount earned by him in that period.

(c) Post immediately notices to its employees in its New York office stating (1) that respondent will cease and desist in the manner aforesaid, and (2) that such notices will remain posted for a period of at least thirty (30) consecutive days from the date of posting."

Upon the refusal of The Associated Press to comply with this order, the Board petitioned the Circuit Court of Appeals, Second Circuit, for its enforcement pursuant to Section 10(e) of the National Labor Relations Act (R. 1-4).

After a hearing before that Court on June 15, 1936, at which the application of the Act to The Associated Press and its constitutionality were fully argued, the Court granted the petition of the Board in all respects (R. 445).

The Nature of the Business of The Associated Press

The record shows * that The Associated Press is a membership corporation, organized under the laws of the State of New York, and engaged in the collection, compilation, formulation and distribution of intelligence in the form of the important news of the world (R. 56). The AP, however, is distinctly *not a mere conduit for news* (R. 118, 120, 125). This news is collected through its own agents, from its members representing over 1300 morning, evening and Sunday newspapers and by exchange contracts with foreign agencies (R. 56, 57, 63, 71, 87-89). The raw news thus collected is formulated by editing, rewriting, selecting, balancing, or discarding in whole or in part (R. 66-69, 84-89, 93-95, 101-102, 120-122, 140-141); and the formulated news, if it is to be used, is then transmitted to member newspapers and to the foreign agencies in accordance with mutual exchange agreements. The Associated Press is not engaged in the business of selling news (R. 98, 152, 165), is not to make a profit, nor to declare dividends (R. 154-155, Board Ex. 4, Certificate of Incorporation); the cost of its operations is apportioned among

* The AP setup, the nature of its business in general, and the functions of the New York office and all the editorial employees therein, are fully explained in the testimony of Lloyd Stratton, Assistant General Manager, of the AP (R. 54-169). This is, we believe, summarized accurately in the answer to the Board's complaint (R. 16), less accurately in the Intermediate Report of the Trial Examiner (R. 27) and the decision of the Board (R. 416), and still less accurately in the Board's complaint (R. 12). The opinion of the Court below merely purports to summarize the findings of the Board on these questions (R. 438-439).

its members by assessment (R. 80-82, 95-96, 131, 143, 343-345, Board Ex. 4, By-Laws, Art. IX); and its membership is limited to owners of newspapers (R. 96, 154, Board Ex. 4, By-Laws, Art. II). The Associated Press does not own or operate any instrumentalities of interstate commerce, the receipt of raw news, otherwise than by personal delivery, and the transmission of formulated news being conducted by the United States Mails (R. 139) or by the public service companies actually engaged in the communications business (R. 87, 91-92, 96-97).*

It is clear that on these facts The Associated Press is neither an agency nor an instrumentality of interstate commerce. Indeed, neither the Trial Examiner, the Board, nor the Circuit Court of Appeals expressly found that it is. They apparently assumed, however, without finding it to be a fact, that The Associated Press was not materially different from the railroad, radio, telegraph and telephone companies. Manifestly, The Associated Press is not a carrier for hire, is not in any respect a public utility, is not engaged in the transportation or communications business, and does not own, maintain, or operate any agency or instrumentality of interstate or foreign commerce. It is under no legal obligation to render service to anyone except its members, and for no longer time, nor in any other manner, than may be agreed upon between them. And here also there is no finding to the contrary by either the Trial Examiner, the Board or the Court below.

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* The term "leased wires" which often appears in the record is purely a colloquialism, referring to contracts for long term use of the various communication facilities, and does not indicate (outside of teletype machines, etc., which are used in the various local offices) any ownership or other interest in the communication facilities themselves (R. 91-92, 97-98, 125).

Nature of the Work of the Editorial Employees in the New York City Office

The alleged unfair labor practice on the part of The Associated Press in discharging and refusing to reinstate Morris Watson, an editorial employee in its New York City office, relates solely, of course, to that office and to the editorial employees engaged therein (R. 62, 194-195). Although this is the principal office, it is by no means the central office or "throat" through which all of the AP news flows (R. 85-95, 98-100, 120-122, 134, 140-141); it is merely one of the many offices of The Associated Press whose "control of news is extremely decentralized or 'broken down'" (R. 75, 85). Nor does all the news coming into the New York City office necessarily pass on into other states or into other offices; much of it may never leave the office in which it is first originated or received (R. 85, 90, 98, 149).

Moreover, the New York City office is itself divided or broken down into two distinct departments, the Traffic Department and the News Department (R. 82-84, 136-137). All of those employees who are engaged in the actual receipt, transmission or distribution of news are in the Traffic Department (R. 83, 132); all other employees, including Watson and every editorial employee, are grouped in the News Department (R. 136-137, 219).*

The editorial employees in the New York office, therefore, have no connection whatever with the mechanical or physical transmission of news; they are engaged exclusively in its collection or formulation. The nature and extent of this editorial work is abundantly and repeatedly shown in

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* The distinction is well expressed by the witness R. H. Hippelheuser, called by the Board:

> "* * * I would say that an editorial employee in The Associated Press was a person who was engaged in the *production* of news features and photos as differentiated between those people who were engaged in the *dissemination* of news and features and photos." R. 240.

the record. Aside from the collection of news, by actually going out on "stories" or "assignments", the editorial employees are engaged in examining incoming news, rewriting it, selecting and discarding, writing "leads" or titles for it, balancing it to make up proportionate news reports according to the special needs of the respective localities and newspapers to which the reports are to be sent (R. 66-69, 84-89, 93-95, 101-102, 189, 215). Not all of the incoming news is used. It may be "killed" completely, not used at all (R. 101, 117); it may be used solely for local purposes (R. 140-141, 149). It would be wholly inaccurate to characterize such work as a mere rerouting of incoming news into outgoing channels.

The closest contact of any of the editorial employees with the actual transmission of news is that of the so-called "filing editors" who, subject to supervision, determine what news is to go out on particular wires and who hand the typed items of news, after they have been formulated, to members of the Traffic Department for transmission (R. 111, 113, 119, 120). Except for a brief period during which Watson was a filing editor, a period long ante-dating the present charges, he was engaged in editorial work which was always subject to revision by or before it reached the filing editor (R. 186, 191, 213, 218-219, 224-226).

Decision Below

The National Labor Relations Board, in disregard of the foregoing facts, concluded that (R. 423):

> "The operations of the respondent and of its editorial employees occur in the course and current of commerce among the several States and with foreign countries; are an integral part of the operations of the instrumentalities of such commerce; and constitute commerce among the several States and with foreign countries."

The Board, with no less disregard for the record, we submit, went on to find that The Associated Press had discriminated against Morris Watson because of his Guild activities, and that such discrimination tended to lead to labor disputes burdening commerce. The Board said (R. 430-431):

> "We think that it is beyond dispute that Watson was discharged and discriminated against in regard to hire and tenure of employment to discourage membership in the Guild. Respondent did not choose by evidence to rebut the clear implications of the Board's testimony, but chose, rather, to rely on its point that the Board is without jurisdiction in the premises. We find further that by the discharge of Morris Watson respondent has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.
>
> The aforesaid acts of respondent tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce. Watson and the other editorial employees of respondent at its New York office in the activities hereinbefore described were directly engaged in interstate and foreign commerce by facilitating and making possible the flow of news from place to place throughout this country and other countries; and any interference with or cessation of such activities would hamper, impede, and interfere with such commerce.
>
> Any cessation of editorial activities at the New York office would cause a break in the flow of foreign news and of some of the important domestic news and, until such break could be repaired or in some manner overcome, would seriously impede, if not prevent, the issuance of newspapers in all parts of the country."

For the foregoing reasons the Board concluded as a matter of law that The Associated Press has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subdivisions (1) and (3) of the National Labor Relations Act.

The Circuit Court of Appeals, evidently relying upon the provision in Section 10(e) of the Act that the findings of the Board are conclusive, made no apparent effort of having searched the record in order to determine whether or not such findings were supported by substantial evidence. Having accepted the findings as conclusive, the Court went on to hold that the National Labor Relations Act could be constitutionally applied to The Associated Press and its editorial employees.

The process of reasoning by which the Court reached the conclusion that the Act, as thus applied, is a proper regulation of interstate commerce, is of particular interest. In substance, the Court reasoned as follows:

> (1) "The relation of employer and employee in local industries, not directly affecting interstate commerce, is not subject to federal regulation under the commerce clause"; (R. 440)
>
> (2) "But the federal power to regulate interstate communication which constitutes interstate commerce has been established so far as the instrumentalities of interstate communication are concerned, * * *";
>
> (3) "The business of respondent which merely is a special form or instance of interstate communication is included in the concept of interstate commerce";
>
> (4) "It appears clear that respondent in its business of gathering and distributing news is engaged in interstate commerce"; (R. 441)

(5) "Industrial disputes in an industry or business engaged in interstate commerce may, and frequently do, burden and interrupt the flow of such commerce. Congress recognized this in section 1 of the act";

(6) "A labor dispute affecting the rewriting staff [of the A P] would be a dam to the flow of this news and might or would cut off interstate and foreign receipts and transmission";

(7) "Congress, recognizing this, had power under the commerce clause to enact suitable legislation to deal with practices which have been shown to obstruct or burden interstate commerce"; (R. 442)

(8) "If Congress may, in order to facilitate the amicable settlement of labor disputes, seek to make 'the appropriate collective action' of employees on interstate railroads 'an instrument of peace rather than of strife' it may do so with respect to an interstate system devoted to interstate communication"; (R. 443)

(9) "In the present case, the editing of a message in interstate commerce is not a break in continuity equivalent to manufacturing a finished product from raw materials. Consequently, it is within the federal regulatory power"; (R. 443-444).

The Circuit Court of Appeals then went on to hold that the enforcement of the Act would not deprive The Associated Press of liberty and property without due process of law in violation of the Fifth Amendment, saying (R. 445):

"This Act does not hamper the *legitimate* right of the employer, who may discharge his employees for

> inefficiency or any other cause agreeable to him, provided he does not use the power of discharge as a weapon for interfering with the right of employees to organize and bargain collectively. The employer retains full control to bargain with his employees over the wage he shall pay and the working conditions he shall furnish. He remains the master of the operation of his business."

The various fallacies in the Court's reasoning will be pointed out as we proceed. We stop to mention the utter inaccuracy of the analogy sought to be drawn between The Associated Press and railroads which are themselves the "instrumentalities" of commerce.

Furthermore the Court completely overlooked, or else intended the last quoted statement to dispose of, the further contentions The Associated Press made before it that the enforcement of the Act (1), by the rendition of a money judgment and compelling the reinstatement of Morris Watson, would deny The Associated Press the right to trial by jury in violation of the Seventh Amendment, and the even more serious contention (2) that the freedom of the press would thereby be curtailed in contravention of the First Amendment.

Specifications of Error

The ultimate error is that the Circuit Court of Appeals erred in holding the National Labor Relations Act constitutional as applied to the relations between The Associated Press and its editorial employees (Petition for Certiorari in this cause at page 8).

Summary of Argument

While denying (1) that its silence upon the hearing may be taken as an admission of discrimination against the Guild members, or (2) that the findings of the Board as to such discrimination are supported by substantial evidence, The Associated Press readily concedes that it is opposed to the intervention of the National Labor Relations Board in matters between itself and its editorial employees. The Associated Press believes that the authority claimed by the Board under the National Labor Relations Act is nonexistent for the following reasons:

I. The Act is void in its entirety as an unrestricted attempt to regulate the relationship between all industrial employers and employees, by imposing "collective bargaining" upon them, in violation of the Tenth Amendment.

II. The relation between The Associated Press and its editorial employees is not interstate commerce, does not directly affect such commerce, and is not subject to Federal control.

III. The Act violates the Fifth Amendment and is void because its terms are arbitrary, unreasonable and capricious, having no real and substantial relation to the accomplishment of legitimate ends. In addition the Act denies the right to trial by jury in violation of the Seventh Amendment.

IV. The Act, in its application to The Associated Press, violates the First Amendment to the Constitution which guarantees to citizens freedom of speech and freedom of the press.

POINT I.

The Act is void in its entirety as an unrestricted attempt to regulate the relationship between all industrial employers and employees, by imposing "collective bargaining" upon them, in violation of the Tenth Amendment.

The Associated Press vigorously contends that whether it is or is not engaged, as to any of its activities, in interstate or foreign commerce, its editorial employees in the New York office are not so engaged, and its relations with said employees do not directly affect such commerce, are not subject to any Federal control and, still less, to the control here resisted by it.

But, putting aside these contentions for the moment, it is still apparent (1) that the National Labor Relations Act is not a regulation only of those activities or relations of persons engaged in interstate or foreign commerce which directly affect such commerce, but is essentially a bold attempt by Congress to impose "collective bargaining" on *all industry;* (2) that in this respect the Act is inseverable, because, to construe the Act as designed to single out for regulation only persons, activities and relations in or directly affecting interstate or foreign commerce would deprive the Act of "its very bone and sinew"; and (3) that the entire Act is consequently void as a complete invasion of the powers reserved to the several States by the Tenth Amendment. These three considerations are discussed in the order stated.

1. The Act is not a regulation only of those activities or relations of persons engaged in interstate or foreign commerce which directly affect such commerce, but is essentially an attempt by Congress, unlimited in scope, to impose "collective bargaining" on all industry.

"The National Labor Relations Act" is, perhaps, aptly named, for its preamble, definitions, provisions, and legislative history conclusively show that the occasional references in the Act to interstate and foreign commerce are colorable at best, and that the fundamental and essential object in view is not the regulation of such commerce or of matters which directly affect it but is, on the contrary, the extensive and compulsory supervision by the Federal government of *all industrial labor relations within the Nation.*

The Title of the Act, "To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes," is hardly apposite in view of what follows.* It should be noted at the outset that the Act has nothing to do with "*the* causes of labor disputes" but relates solely to self-organization and collective bargaining on the part of employees in general which, though highly publicized at the time, are merely two among the many possible and familiar causes of disputes between employer and employee. Further, the Act is not confined to particular disputes which directly burden or obstruct interstate commerce; but embraces all labor disputes (at least, in so far as they result from "in-

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* Though the title of a statute may be used in connection with the context as an aid in removing ambiguities, it is no part of the statute and cannot set at naught its obvious meaning. *Fairport P. & E. R. Co.* v. *Meredith*, 292 U. S. 589; *Strathearn S. S. Co.* v. *Dillon*, 252 U. S. 348; *Caminetti* v. *United States*, 242 U. S. 470, 490; *Patterson* v. *Bark Eudora*, 190 U. S. 169; *Goodlett* v. *Louisville & N. R. Co.*, 122 U. S. 391, 408.

equality of bargaining power") on the broad theory that all such disputes, taken together, have a detrimental effect upon interstate commerce.

A. *That the fundamental purpose of the Act is to impose collective bargaining on all industry, no matter how local, appears in the preamble (Section 1).*

The preamble* does not allude to any purpose in the Act to regulate the manner in which intercourse between the States for the purposes of trade shall be conducted. Instead, interstate and foreign commerce are referred to merely as a basis for regulating matters, admittedly such as are not commerce in and of themselves but which, it is claimed, might, when left unregulated, have an evil effect thereon.

Thus, in the first paragraph of the preamble (Section 1), Congress finds that there are two possible causes of "strikes and other forms of *industrial* strife and unrest", namely, "the denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining". Congress then goes on to find that these forms of industrial strife and unrest "have the intent or the necessary effect of burdening or obstructing commerce". This intent or necessary effect is said to reach attainment by at least one of four possible methods, that is, by

> "(a) impairing the efficiency, safety, or operation of the instrumentalities of commerce;" or
>
> "(b) occurring in the current of commerce;" or
>
> "(c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or

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* The preamble, though no part of the statute (*Yazoo & Mississippi R. Co. v. Thomas*, 132 U. S. 174, 188) may be resorted to in construing ambiguities in the statute. *Beard v. Rowan*, 9 Pet. 301; *Coosaw Mining Co. v. So. Carolina*, 144 U. S. 550. The unambiguous words in the effective provisions of the Act must of course control. *Price v. Forrest*, 173 U. S. 410.

processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or"

"(d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce."

It is clear from this that Congress did not intend to confine the Act to those forms of industrial unrest which actually take place in the current of commerce or among persons operating the instrumentalities of commerce.* The very purpose of Congress as thus disclosed is, on the contrary, to promote self organization and collective bargaining on the part of industrial workers, whether or not such industrial unrest occurs in or about the instrumentalities and flow of commerce. The basic theory is that such unrest, *wherever it occurs*, affects the flow and prices of commodities in commerce or causes diminution of employment and wages in such volume as substantially to impair or disrupt the market for such commodities.

That the effect of industrial unrest upon the purchasing power of the industrial worker, and not merely the location of

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* The only Committee report in Congress which discussed the preamble in any detail was the report of the House Committee on Labor, Report No. 1147, 74th Cong. 1st Sess. (June 10, 1935) on S. 1958, at pp. 8, 9. There is no mention in that report of the assertion in the preamble that industrial unrest has the intent or necessary effect of burdening or obstructing commerce by "(a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce;". Decided emphasis is, however, placed upon the finding that a diminution in industrial wages would affect commerce.

The report of the Senate Committee on Education and Labor, Report No. 573, 74th Cong. 1st Sess. (May 1, 1935) on S. 1958, merely states at page 6: "*Section 1. Findings and declaration of policy.*—This section states the dual objective of Congress to promote industrial peace and inequality of bargaining power by encouraging the practice of collective bargaining and protecting the rights upon which it is based". This statement, of course, referred to the preamble as it was phrased prior to the decision of the *Schechter* case, *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (May 27, 1935).

the unrest, was the primary concern of Congress is further shown by the second paragraph in the preamble. Here Congress finds that "inequality of bargaining power * * * substantially burdens and affects the flow of commerce, and tends *to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.*"

The necessity of including local industry, in order to complete effectively the legislative plan is further illustrated by the finding in the third paragraph that:

> "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of *industrial strife* and unrest, by encouraging practices fundamental to the friendly adjustment of *industrial disputes* arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees."

Even if these "Findings" of Congress are true (and they have no self-probative force), they prove far too much. They prove that the supervision of the relation between a particular employer and his particular employee, who both happen to be engaged in interstate commerce would have little or no effect on commerce. For it is only by the universal improvement of labor relations in *all* industry, with few exceptions, that the general ability to purchase would be sufficiently promoted to have any tendency whatever materially to increase commerce.

Having made the findings which have been discussed above, Congress then declares it to be:

> "* * * the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by *encouraging the practice and procedure of collective bargaining* and by *protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.*"

This may be "the policy of the United States," but much of the policy thus declared has nothing whatever to do with the actual provisions of the National Labor Relations Act. The Act, as will be seen, is not designed "to eliminate *the causes* of certain *substantial* obstructions to the free flow of commerce", but solely to control and supervise the bargaining between employers and employees in industry, as *one* of the possible causes of certain obstructions to the free flow of commerce. Nor, indeed, is it the policy of the Act "to *mitigate and eliminate* these obstructions *when they have occurred*", for, the Board is given no power whatever to eliminate or mitigate strikes or other obstructions "when they have occurred". On the contrary, the Board is expressly enjoined from interfering with the right to strike "in any way" (Section 13). Thus, the policy of the Act, regarded in its most favorable light, is not to regulate commerce, or even to remove or eliminate *actual* burdens or obstructions thereto, but *solely* to remove "inequality of bargaining" between every employer and his employee as an alleged cause, among many possible causes, of strikes or other forms of industrial unrest. Such forms of industrial unrest are in turn neither substantial,

direct nor imminent obstructions *per se* to interstate or foreign commerce, particularly when compared with other likely obstructions.* The Act, viewed as a whole and in the light of the evils sought to be corrected, is not a regulation of interstate or foreign commerce but is no more and no less than an act to discourage strikes or, more specifically, one to remove "inequality of bargaining" in all private industry.**

B. *This sweeping purpose is even more clearly shown by the very provisions and definitions in the Act.*

The definitions contained in Section 2 of the Act show that, neither the persons, the relations, nor the acts to which the

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* The evidentiary data which has been prepared in support of the Act (Bulletin No. 1 of the National Labor Relations Board, Division of Economic Research, August 1936) merely shows that strikes and other forms of industrial unrest (which apparently result with some frequency from disagreements as to the various phases of collective action on the part of employees) spasmodically interrupt the continuity of production. It would seem that no one would seriously dispute this fact. Many, however, would seriously dispute the contention that the interruptions in production would necessarily and directly result in interruptions of commerce; and, aside from the opinion of "experts," selected by the Board in its preparation of the evidentiary data contained in the Bulletin, there does not appear to be any evidence which plainly shows that interstate commerce, rather than production, would be directly affected by strikes, etc. And, finally, even if the data did show the effect to be on commerce rather than production, it does not even purport to compare, either in point of size, permanency, or causation, obstructions resulting from non-collective action with all other possible obstructions to interstate and foreign commerce.

** The language of an act of Congress is to be read in the light of its policy. *First National Bank of Wellington* v. *Chapman*, 173 U. S. 205. The secondary policy should not defeat the primary policy. *Platt* v. *Union Pacific R. Co.*, 99 U. S. 48.

For the purpose of ascertaining the true meaning and intention of the words of the statute, regard is to be had to the evils which called forth the enactment. *Warner* v. *Goltra*, 293 U. S. 155; *Fazzio* v. *United States*, 272 U. S. 620; *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554.

Statutes are to be construed, if possible, so as to accomplish the object for which they are passed. *Royal Indemnity Co.* v. *Am. Bond & Mort. Co.*, 289 U. S. 165; *Grau* v. *United States*, 287 U. S. 124; *Piedmont & N. R. Co.* v. *I. C. C.*, 286 U. S. 299; *St. Louis & O'Fallon R. Co.* v. *United States*, 279 U. S. 461; *Am. Tob. Co.* v. *Werckmeister*, 207 U. S. 284; *Hamilton* v. *Rathbone*, 175 U. S. 414; *Rhodes* v. *Iowa*, 170 U. S. 412; *Bernier* v. *Bernier*, 147 U. S. 242; *Wood* v. *United States*, 16 Pet. 342.

statute pertains, have any direct or immediate connection with interstate or foreign commerce.

The term "employer" includes *"any* person acting in the interest of an employer" whether or not he is engaged in interstate commerce or in any business directly related thereto. The only exceptions are the United States, the States, and, it is important to note, "any person subject to the Railway Labor Act" or *any labor organization* or officer or agent thereof (Section 2, (2)).

The term *"employee"* includes *"any* employee" and indeed includes "any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice". The only exceptions are "any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse" (Section 2, (3)). These exceptions were evidently made for "administrative reasons" only.*

The definition of "commerce" contained in Section 2 (6) of the Act is the orthodox one for interstate or foreign commerce but, as already indicated, and subsequently shown, the Act does not attempt to regulate commerce itself but merely

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*It is stated in the Report of the Senate Committee on Education and Labor, Report No. 573, *supra*, at page 7, *"For administrative reasons*, the committee deemed it wise not to include under the bill agricultural laborers, persons in domestic service of any family or person in his home, or any individual employed by his parent or spouse. But after deliberation, the committee decided not to exclude employees working for very small employer units. The rights of employees should not be denied because of the size of the plant in which they work".

Mr. Marcantonio, of the House Committee on Labor, dissented from the report of the majority on the ground, among others, that the Bill did not apply to agricultural workers. He concluded his dissent as follows:

> "I, therefore, respectfully submit that there is not a single solitary reason why agricultural workers should not be included under the provisions of this bill. *The same reasons urged for the adoption of this bill in behalf of the industrial workers are equally applicable in the case of the agricultural workers, in fact more so as their plight calls for immediate and prompt action."* (See House Report No. 1147, *supra*, at p. 30.)

certain local activities and relations which, whether precedent or subsequent, are said to have a bearing on it.

For this reason the definition of "affecting commerce" contained in Section 2 (7) of the Act is of particular interest. The phrase "affecting commerce" is there defined to mean "in commerce or burdening or obstructing commerce or the free flow of commerce [but not directly], *or having led or tending to lead to a labor dispute* burdening or obstructing commerce or the free flow of commerce". Though skillfully phrased, *this definition necessarily means that "the denial by employers of the right by employees to organize and the refusal of employers to accept the procedure of collective bargaining" are matters "affecting commerce."* This is so because Congress had previously found in the first paragraph of the preamble (Section 1) that these two particular acts on the part of all employers lead to labor disputes which have the intent or the *necessary effect* of burdening or obstructing commerce.* It should be noted that the term "direct effect" is not to be found within the statute.

The term "labor dispute", as defined in Section 2 (9) of the Act broadens, if anything, the meaning of "affecting commerce" because it includes *"any controversy* concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether the disputants stand in the proximate relation of employer and employee".*

Turning from the definitions to the active provisions of the statute, it should be first noted that there is no language designed to limit them to persons, activities, or relations in or directly affecting interstate commerce. The provisions in

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* The statute must be taken as a whole. The meaning of a word or phrase is to be gathered from its context. *Helvering* v. *Morgan's*, 293 U. S. 121; *U. S.* v. *Murdock*, 290 U. S. 389; *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484; *Costanzo* v. *Tillinghast*, 287 U. S. 341; *D. Ginsberg & Sons* v. *Popkin*, 285 U. S. 204; *Tex. & N. O. R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548.

Sections 3, 4, 5, and 6, setting up the National Labor Relations Board, contain no such limitation; the provisions of Sections 7 and 8, relating to the so-called "rights of employees" contain no such limitation; nor is any such limitation found in the provisions of Section 9, concerning representatives and elections, nor even in the provisions of Section 10 providing for the machinery of enforcement, nor, finally, in the provisions of Section 11, conferring upon the Board broad investigatory powers. Indeed, the so-called "limitations" set forth in Sections 13, 14, 15, and 16, do not mention interstate commerce in any way and clearly do not seek to restrict the power of the Board to matters in or directly affecting such commerce. The penalties provided in Section 12 are co-extensive with the powers of the Board.

Were it not for the title, preamble, and definitions of the Act, broad, sweeping and vague as they are, one would not even suspect that the Act purported to be a regulation of interstate or foreign commerce or of matters directly relating thereto. Commerce is referred to but twice throughout the effective provisions of the Act. The first mention of the word is found in Section 9 (c) providing that "whenever a question *affecting commerce* arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties in writing the name or names of the representatives that have been designated or selected". The second and last mention of the term within the body of the Act is found in Section 10 (a) providing that "the Board is empowered, as hereinafter provided, to prevent *any person* from engaging in *any* unfair labor practice (listed in section 8) affecting commerce".* Except in these two places

* *Quaere* whether this phrase "affecting commerce" is merely a repetition of the declaration and findings in the preamble to the effect that all "unfair labor practices" affect commerce; or whether it is intended as a limitation of the jurisdiction of the Board to matters "affecting commerce" as that phrase is sweepingly defined in Section 2(7). But, because of the breadth of this statutory definition of "affecting commerce" and the avowed policy of the Act to prohibit all "unfair practices," any possible ambiguity resulting from the phrase as used above in the text of the Act, is of no great import.

the power of the Board has no relation to interstate commerce at all. And even with a question concerning representation or the prevention of "any unfair labor practice", the power of the Board is not confined to interstate commerce itself or to matters *directly* affecting it, but is solely limited by the phrase "affecting commerce" as broadly defined in Section 2 (7) of the Act. Thus, the Board is empowered (if not directed) by the terms of the Act to investigate, control, and adjust labor relations all over the country, no matter how private, no matter how internal or domestic, and without regard to the jurisdiction of Congress over interstate commerce. Indeed the Board itself has so construed the Act. It, as the recent compilation of its decisions shows, has begun proceedings against all kinds of employers in local industry.*

And yet, the Court below apparently assumed (R. 442) that the Act is in substance a regulation of commerce because unequal and unregulated bargaining between employer and employee may lead to strikes and industrial strife which, as the preamble asserts, "have the intent or the necessary effect of burdening or obstructing commerce". The assumption, as we have seen, finds no support in the Act. No provision is to be found within the four corners of the Act authorizing the Board to interfere with, impede, or diminish an *actual* obstruction to interstate commerce in the form of strikes or any

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At any rate, the phrase "affecting commerce" was not intended as a limitation of the jurisdiction of the Board to matters "*directly* affecting commerce," as that phrase has been employed in previous decisions of this Court. (See the legislative history of the Act which is discussed immediately hereafter.)

* See, in addition to the group of cases now before the Court, the proceedings and decisions of the Board, compiled in Commerce Clearing House, Labor Law Service, pp. 15,401, *et seq.* paragraphs 15,401, *et seq.* and, particularly, the names of the persons proceeded against (*Id.* at pp. 15,991, *et seq.*).

It is understood that the Labor Board has separately published a complete compilation of its decisions, which should be available by the time of argument.

other form. On the contrary, Section 13 of the Act expressly provides that:

> *"Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."*

Can Congress thus sanction the very obstruction that it purports to prevent? Even if it could, it would still seem that the Act can only be considered as an attempt, by regulatory process, to improve the bargaining status of the industrial worker no matter what may be the field of his activity. This is not in any true sense a regulation of commerce between the States.

C. *The legislative history of the Act leaves no possible doubt as to the essentially universal purpose of the Act.*

The three Committee Reports in Congress clearly explain the intent of Congress in regard to the interpretation and application of the National Labor Relations Act.* On the first page of all three Reports, S. 1958, from which the Act is derived, was described as a bill "to promote equality of bargaining power between employers and employees, to diminish the causes of labor disputes, to create a National Labor Relations Board, and for other purposes". There was no men-

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* The House Committee on Labor submitted two reports on S. 1958. The first report was rendered before the decision of this Court in *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495 on May 27, 1935 (Report No. 972, 74th Cong., 1st Sess., May 21, 1935). The second report was submitted shortly after the *Schechter* decision (Report No. 1147, 74th Cong., 1st Sess., June 10, 1935). The Senate Report was rendered prior to the decision in the *Schechter* case (Report No. 573, 74th Cong., 1st Sess., May 1, 1935).

It is well settled that House or Senate Committee Reports may be regarded as an exposition of the legislative intent in determining the purpose and meaning of a statute when subject to doubt. *United States* v. *Shreveport Grain & Elevator Company*, 287 U. S. 77, 83-85; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; *Railroad Commission of Wisconsin* v. *Chicago B. & Q. R. R. Co.*, 257 U. S. 563; cf. *Van Camp & Sons* v. *American Can Co.*, 278 U. S. 245, 253.

tion of interstate commerce or of the fact that labor disputes might be a burden and obstruction thereto.

One is immediately struck, in reading these reports, with the frequent reference to industry, to the assertions that it is essential to enforce collective bargaining on behalf of all workers in industry, and to the lack of any mention of workers engaged in actual transportation or in the "current of commerce".

It is also interesting to note that the decision of this Court in *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, did not in any way deter Congress from its original and primary purpose of extending and re-enforcing Section 7(a) of the N. I. R. A. by further legislation. The *Schechter* decision did bring about certain changes in the draftsmanship of the bill, but none whatever in its substance.* The most radical changes were (1) that the present preamble was adopted in entirely new form and (2) that the definition of "commerce" was changed by substituting "commerce, transportation, or communication" for "or commerce, or any transportation or communication relating thereto." As a substitute for the former definition of "commerce," however, an entirely new definition of "affecting commerce" was substituted in Section 2(7) of the Act.

That Congress did not intend these changes to restrict the scope of the Act to relations or activities in or directly affecting interstate commerce is shown by the following statement of the House Committee on Labor in regard to the new preamble (June 10, 1935 report, *supra*, at p. 9):

> "The committee amendment to this section reformulates the declaration of policy in order to *emphasize the intent of the bill to promote industrial peace*,

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* The alterations resulting from the *Schechter* decision are shown in the House Report of June 10, 1935, at pages 1-3.

and therefore to bring it more clearly outside of the ruling in the Schechter case."

The Senate Committee Report, although submitted prior to the *Schechter* decision, took the same attitude. It stated (p. 1):

> "The first objective of the Bill is to promote industrial peace."

and went on to say (p. 3):

> "The second major objective of the Bill is to encourage, by developing the procedure of collective bargaining, that equality of bargaining power which is a prerequisite to equality of opportunity and freedom of contract."

The Senate Committee, as well as the House Committee, was of the opinion that the Act was constitutional even though it involved all industry and was not restricted to interstate commerce activities. It said on the question of constitutionality (p. 18):

> "In effect upon commerce, wage levels are as significant as price levels, for the exchange of goods depends as much upon the consumer's income as upon the price which he must pay. Income and cost of living must be indexed in terms of each other. An analysis of the effect of a decline in mass purchasing power upon all commercial transactions forces the conclusion that the protection of Nation-wide commerce depends as much upon a floor for wages as upon a ceiling for prices. *And in stabilising wages, no factor plays a more important role than collective bargaining."*

2. In this respect the Act is inseverable. Its scope cannot be limited by construction or by the separability clause (Section 15*).

It is true that Section 15 of the Act contains the usual separability provision, but it cannot be supposed that Congress thereby intended to permit the courts, by construction, to change the essential purpose of the Act. The declaration of separability merely reverses the presumption that the Act shall be wholly void unless it is permitted to operate in its entirety. "But", as the majority of this Court stated in *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330, 362, "notwithstanding the presumption in favor of divisibility which arises from the legislative declaration, *we cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole*". To the same effect see *Carter* v. *Carter Coal Company*, 298 U. S. 238, 312-317; *Hill* v. *Wallace*, 259 U. S. 44, 70; *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 242.**

As we have seen, the preamble, definitions, provisions, and legislative history of the National Labor Relations Act conclusively show that the essential purposes of the Act are (1) to promote industrial peace throughout all industry, and (2) to stabilize or even increase wages and employment throughout the country by compelling all employers in in-

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* "SEC. 15. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

** On the inadvisability of rewriting a statute in order to save its validity see also: *United States* v. *Reese*, 92 U. S. 214; *Trade-Mark Cases*, 100 U. S. 82; *United States* v. *Harris*, 106 U. S. 629; *Baldwin* v. *Franks*, 120 U. S. 678; *James* v. *Bowman*, 190 U. S. 127; *Illinois Central R. R.* v. *McKendree*, 203 U. S. 514; *First Employers' Liability Cases*, 207 U. S. 463; *Butts* v. *Merchants Transportation Co.*, 230 U. S. 126; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500.

dustry to bargain collectively with their employees, and by encouraging self-organization among such employees. If then the Act, by some forced construction, were confined in application to employers and employees actually engaged in interstate commerce, these very purposes for which it was enacted would be totally defeated. Congress did not intend to favor employees engaged in interstate commerce over those engaged in industry. No indication can be found within the four corners of the Act, or in its legislative history, of an intention to benefit persons engaged in interstate transportation except in so far as such persons might incidentally fall within the general classification of industrial workers. With persons subject to the Railway Labor Act expressly excepted by the National Labor Relations Act (Section 2(2)), few employees among those remaining would be benefited by a restriction of the Act to persons actually engaged in interstate or foreign commerce. So to construe the Act would practically nullify it.

The "very bone and sinew" of the Act viewed as a whole is, therefore, the attempt to enforce by compulsion the rights of all employees as declared in Section 7. As Mr. Justice Cardozo said of the similar provisions of Section 7(a) of the N.I.R.A., in relation to the entire statutory scheme (concurring opinion in *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 555):

> "*Wages and the hours of labor are essential features of the plan, its very bone and sinew.* There is no opportunity in such circumstances for the severance of the infected parts in the hope of saving the remainder. A code [or a statute] *collapses utterly with bone and sinew gone.*"

3. The entire Act, being essentially a regulation of the employer-employee relationship in all industry, local or nation-wide, is a patent violation of the Tenth Amendment.

As the Act is nothing more than an attempt by Congress to regulate employer-employee relations in all industry, in the hope thereby to promote the general welfare, it is devoid of any constitutional foundation. It is well established that the powers of Congress are limited to those expressly delegated to it by the Constitution or to be implied therefrom, and that, consequently, Congress has no general welfare power. *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *United States* v. *Butler*, 297 U. S. 1. See also *Jacobson* v. *Massachusetts*, 197 U. S. 11, 22. Accordingly, if the National Labor Relations Act is to be sustained, it can only be sustained if it is, in substance and effect, a valid regulation of interstate or foreign commerce, pursuant to the commerce power of Congress. Indeed the authors of the Act made no pretense to the contrary. Thus the House Committee on Labor says in its June 10, 1935 report, *supra*, at page 10:

> "The bill is based *squarely* on the power of Congress to regulate commerce among the several States and with foreign nations."

But Congress, in other legislation now standing on the statute books, has already declared: "The labor of a human being is not a commodity or article of commerce." (Clayton Act, §6, c. 323, §6, 38 Stat. 731.) And that the regulation of the employer-employee relationship in all industry, no matter how local, is not in any just sense a regulation of interstate or foreign commerce should require little if any elaboration. There appear to be few propositions in the realm of Constitutional Law which are more fundamen-

tal or more clearly settled. Mere reference to the recent decisions in *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, with regard to hours and wages, and *Carter* v. *Carter Coal Co.*, 298 U. S. 238, with regard to hours, wages and collective bargaining, should be amply sufficient.*

Nor should it be necessary to enlarge upon the statement that there is no constitutional means of accomplishing an unconstitutional end. Ever since the famous case of *McCulloch* v. *Maryland*, 4 Wheat. 316, 423, no one has supposed that Congress could "* * * under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government * * *."

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* Manufacture is not commerce. *Kidd* v. *Pearson*, 128 U. S. 1, 20; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12.

The fact that the finished product is eventually sold and delivered beyond the state does not convert production, manufacture or processing into interstate commerce. *Coe* v. *Errol*, 116 U. S. 517; *Delaware, Lackawanna & Western RR Co.* v. *Yurkonis*, 238 U. S. 439, 444; *Hammer* v. *Dagenhart*, 247 U. S. 251, 272; *Crescent Oil Co.* v. *Mississippi*, 257 U. S. 129, 136; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245; *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, 178; *Champlin Refining Co.* v. *Commission*, 286 U. S. 210, 235; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 182; *Chassaniol* v. *City of Greenwood*, 291 U. S. 584; *Carter* v. *Carter Coal Co.*, 298 U. S. 238.

Nor does the fact that the raw products used in manufacturing or processing originate beyond the state convert that manufacturing or processing into interstate commerce. *General Oil Company* v. *Crain*, 209 U. S. 211; *Schechter Corp.* v. *United States*, 295 U. S. 495, 543.

And the fact that the material manufactured or processed has been shipped in from another state and is going to be shipped out to a third state does not necessarily convert the manufacture or processing into interstate commerce. See *Arkadelphia Co.* v. *St. Louis S. W. Ry.*, 249 U. S. 134, 151; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.* (C. C. A. 5th June 15, 1936) 83 F. (2) 998; *National Labor Relations Board* v. *Friedman-Harry Marx Clothing Co. Inc.* (C. C. A. 2d 1936) 85 F. (2) 1; *Pratt* v. *Stout* (C. C. A. 8th 1936) 85 F. (2) 172; *Fruehauf Trailer Co.* v. *National Labor Relations Board* (C. C. A. 6th 1936) 85 F. (2) 391; *Foster Bros. Mfg. Co.* v. *National Labor Relations Board* (C. C. A. 4th 1936) 85 F. (2) 934.

Since production, manufacture and processing are not interstate commerce, the labor relations of those engaged in such activities do not, *a fortiori*, so directly affect interstate commerce as to become subject to Federal regulation. *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495; Cf. *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344 with *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295.

It has always been understood that, as Mr. Chief Justice Marshall further stated (p. 423), "it would be *the painful duty of this tribunal,* should a case requiring such a decision come before it, to say that such an act was not the law of the land." Nor can it be said that this Court has ever shirked its duty, no matter how painful, by allowing mere form to destroy substance.* Indeed, there have been no divergent opinions in this Court as to the duty itself, but simply as to the occasion for its performance.

Here there is no question of construction; there is no room for inference. In form, substance and basic purpose, the Act is an attempt by Congress to control hours, wages, conditions and continuity of employment, in industry, by compelling all industrial employers to accept the principle of collective bargaining in its most extreme form.

As conclusively proved in the decisions of *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, and *Carter* v. *Carter Coal Company,* 298 U. S. 238, an attempted regulation, so unlimited in scope, could not possibly be a valid exercise by Congress of its commerce power.

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* *Hammer* v. *Dagenhart,* 247 U. S. 251; *Child Labor Tax Case,* 259 U. S. 20; *Linder* v. *United States,* 268 U. S. 5; *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330; *Schechter Corp.* v. *United States,* 295 U. S. 495; *United States* v. *Constantine,* 296 U. S. 287; *United States* v. *Butler,* 297 U. S. 1; *Carter* v. *Carter Coal Co.,* 298 U. S. 238.

POINT II.

The relation between The Associated Press and its editorial employees is not interstate commerce, does not affect such commerce, and is not subject to Federal control.

If the National Labor Relations Act is not void in its entirety because of its unrestricted scope, it still does not follow that the Act can be constitutionally applied to the AP and its relations with Morris Watson or its other editorial employees. On the contrary, the uncontroverted facts of the record and a wealth of decisions plainly show that the relations between the AP and its editorial employees are not interstate commerce, do not directly affect it, and are not subject to Federal control.

1. The power of Congress is strictly confined to the regulation of interstate commerce and those matters by which it is directly affected.

Interstate commerce is an act and like other acts must be performed by men. It is done "by the labor of men and with the help of things," but it is only while or so long as they are engaged (1) in the act of interstate commerce itself or (2) in activities which directly affect the act of interstate commerce by others, that men come within the reach of Federal power.

This is axiomatic. It is equally axiomatic that the right to engage in interstate commerce is a natural right which antedates the Constitution and which Congress can neither grant nor withhold at its pleasure. It may regulate it in order to preserve the freedom and safety of interstate commerce and as a corollary it may go on to prevent the abuse of the right itself. Thus the freedom and safety of commerce

are the cardinal objectives of such statutes as the Interstate Commerce Act, the Safety Appliance and other Railroad Acts and of the various anti-trust laws. The prevention of abuse supplies the basis for the Lottery Act, the Pure Food and Drug Act, the Motor Vehicle Act, and statutes of like character. To protect the right to engage in interstate commerce, by prescribing rules for its guidance, and to prevent the abuse of that right to the public detriment—these are the plain guideposts for Congressional action. Confusion arises only when they are forgotten or ignored.

In one decision after another this Court has labored with tireless industry to make all this clear. Not a line in any one of its opinions lends countenance to the idea that the commerce power can be stretched to reach the regulation of lawful industry which, even though it may furnish the materials later to be utilized in commerce, is not commerce in and of itself. By a labored reasoning from remote cause to ultimate effect, an effort to the contrary has been often made and has, as often, been repulsed.*

2. An interruption in the process of production or manufacture (or in the case at bar, the procurement of news), although it may lessen the supply of goods available for commerce, is not per se an obstruction to commerce nor does it directly affect it.

The reasoning by which the Board and the Court below reached the conclusion that this Act could be lawfully applied to the AP and its employees followed a familiar and, as this Court has repeatedly held, a futile course. The AP

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* *First Employers' Liability Cases*, 207 U. S. 463; *Hammer* v. *Dagenhart*, 247 U. S. 251; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330; *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495; *Carter* v. *Carter Coal Co.*, 298 U. S. 238. See also cases cited in footnote page 35, above.

in its business of gathering and transmitting news is engaged it is said in interstate commerce; this news must be gathered or rewritten by its editorial employees before it can be transmitted; dissatisfaction on the part of these employees might lessen their efficiency or bring on labor disputes or strikes; strikes might or would cut off the supply of news available for transmission; such failure of supply would obstruct or suspend the existing commerce; and self-organization and compulsory collective bargaining would tend to avert strikes. So, making a leap to the pre-determined conclusion, it is asserted that Congress may enforce collective bargaining in order to remove a possible obstruction to commerce.

Many years ago this method of reasoning was described as "the house that Jack built."* Its fallacy lies in that it spins out too fine the chain of cause and effect and succeeds, as this Court has had frequent occasion to remark, in proving too much. According to the philosophers, the chain of cause and effect has never been broken since Time began, but it is not by such speculations that the Constitution is to be interpreted and statutes sustained. It is direct causes operating directly upon interstate commerce with which Congress is empowered to deal. There may be borderline cases (of which the present is certainly not one), but the principle is clear.

"Obstruction to coal mining," said this Court in *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 408,

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* Letter by Jefferson, from Philadelphia, on the 30th day of April, 1800, to Robert R. Livingston:

"We are here [Philadelphia] engaged in improving our constitution by construction, so as to make it what the majority thinks it should have been. The Senate received yesterday a bill from the Representatives incorporating a company for Roosevelt's copper mines in Jersey. This is under the *sweeping clause* of the Constitution, and supported by the following pedigree of necessities. Congress are authorized to defend the country; ships are necessary for that defense; copper is necessary for ships; mines are necessary to produce copper; companies are necessary to work mines; and 'this is the house that Jack built.'" (VII Ford's Ed. Jefferson's Works, 444.)

"is not a direct obstruction to interstate commerce in coal although it, of course, may affect it by reducing the amount of coal to be carried in that commerce." And in *United Leather Workers* v. *Herkert,* 265 U. S. 457, it was said that "the mere reduction in the supply of an article to be shipped in interstate commerce, by the illegal or tortious prevention of its manufacture, is ordinarily an indirect and remote obstruction to that commerce."

We shall seek later to demonstrate that the assumption of the Court below that the editorial employees of the AP are engaged in interstate commerce is untenable, but the further assertion that labor disputes between them and their employer might or would directly affect such commerce by burdening, obstructing, or seriously impeding its flow, is incomprehensible in the light of this Court's decisions. Manifestly the effect would be quite as remote and no more direct than that produced by labor disputes in any producing industry (*Carter* v. *Carter Coal Company,* 298 U. S. 238; *Schechter Poultry Corp.* v. *U. S.,* 295 U. S. 495; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344).

Indeed, so far as this record shows, a walkout in the New York office would not of necessity materially affect the flow of news. At the hearing before the Trial Examiner the attorney for the Board made a valiant effort to establish factually that a strike or lockout of the editorial employees of the New York office of the AP would completely cut the flow of news (R. 64-69, 102-103, 165-168), and the Board, as well as the Trial Examiner, found that such a disturbance in the New York office "would seriously impede, if not prevent the issuance of newspapers in all parts of the country" (R. 42, 431). There is no evidence in the record to sustain this finding. Indeed, the attorney for the Board, while repeatedly pressing the point, merely proved that a sudden walkout of all the editorial employees in the New York office would

result in but a "momentary, a temporary condition" (R. 167). Moreover, it was clearly established in the record that this condition would not seriously impair the flow of news in other parts of the country, the New York office being merely one point in an extremely decentralized system. Even with European news which ordinarily comes to the cable desk in New York, a stoppage in the New York office would not prevent such news from reaching other parts of the country. As the record shows, "some situation may develop where communications have been disrupted in the ordinary channel and it will flow in another channel" (R. 64). As the record further shows, the AP is well guarded and protected against any physical interruption of the normal movement of news by being constantly prepared to reroute or detour the news (R. 65). It is a pure assumption, therefore, that a strike in the New York office would have a material and destructive effect on the amount or quality of the AP news flowing from state to state. Finally it is common knowledge that the AP is not the only news-gathering agency, and the record shows that its reports are not the only news published by its member papers (Guild Exs. G-1 to G-10, inclusive).

The Court below very properly placed no reliance upon the other consequences which are alleged in the preamble of the Act as those which it is designed to prevent, such as the depression of wage rates and purchasing power, the impairment or disruption of the market. To do so would be to draw out even thinner the thread of causality and to make even more expansive an argument which, as we have said, has already proved far too much for its own good. For it must be clear that if Congress can pass a law to compel collective bargaining and to forbid the discharge of employees, as prescribed by Section 8, it can, when it chooses, go on to laws compelling in express terms the closed shop, the open shop, maximum and minimum wages, hours of employment, safety

devices, sanitary arrangements, housing, the times and manner of payment—everything in short which by any possibility could be thought to promote the contentment of the laborer in any and every industry and thus lead to industrial peace.

The question of power does not turn upon the relative importance of this subject matter or of that. On the contrary, as was said in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 307-308,

> "The distinction between a direct and an indirect effect turns, not upon the magnitude of the cause or of the effect, but entirely upon the manner in which the effect has been brought about."

3. The AP is in no sense an instrumentality of interstate commerce. Its editorial employees, including the complainant Morris Watson, are not engaged in interstate or foreign commerce.

That the AP is not an instrumentality of interstate commerce would seem to be too clear for argument. It is not a carrier for hire. Its services and facilities are not open to the public. Neither it nor its employees have assumed any obligation of continuous service, the performance of which may be compelled by law. It is essentially, as we have pointed out, a private, cooperative, non-profit organization. It is under no obligation to furnish news to anyone except in accordance with its by-laws and its mutual exchange contracts. There is no reason, so far as any law is concerned, why the AP should not be free to close its New York office or indeed all of its offices whenever it may so please. It may cease its business altogether whenever it sees fit. The present intervention by the Federal Government, therefore, is not directed to the regulation of the AP as an instrumentality through which the general public carries on its business in interstate commerce, but is an effort to control the conduct of the AP

itself on the sole excuse that it is hoped thereby to prevent the possible interruption of its business by persons other than itself.

That the AP, as to some of its activities, may be engaged in interstate or foreign commerce is not decisive. Certainly it is not so engaged throughout. Indeed it may be questioned whether the major portion of its activities falls within the accepted definition of the term. For commerce means more than communication. The word "is the equivalent of the phrase 'intercourse for the purposes of trade'." (*Carter* v. *Carter Coal Co.*, 298 U. S. 238, 303.)

"Basically, The Associated Press is an exchange of news system" and nothing more (R. 88).* Even if this exchange were the equivalent of a sale, it would not amount to "trade" because The Associated Press does not exchange news with the public. The exchange is between The Associated Press, its own members and other news agencies (R. 71-73, 87-89, 97-98, 152-154).

So far as exchange of news between AP offices or with its members is concerned, the exchange is, in many respects, similar to communication between principal and agent.**

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* It is true that The Associated Press at one time had an arrangement whereby Keystone View Company on occasion received pictures of The Associated Press which had lost their news value. Such an arrangement, as clearly shown in the record (R. 164-165), was merely a salvage operation.

** In a long line of decisions this Court has held certain businesses not to be interstate commerce, although it was obvious that such businesses constantly used the mails or instrumentalities of commerce. Insurance companies (*Paul* v. *Virginia*, 8 Wall. 168; *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495); those buying and selling bills of exchange (*Nathan* v. *Louisiana*, 8 How. 73); those receiving deposits and sending them abroad (*Engel* v. *O'Malley*, 219 U. S. 128); those dealing in negotiable notes (*Hemphill* v. *Orloff*, 277 U. S. 537); those buying and selling cotton futures (*Ware and Leland* v. *Mobile County*, 209 U. S. 405); advertising agencies (*Blumenstock Brothers* v. *Curtis Publishing Company*, 252 U. S. 436); and those giving entertainments (*Federal Base Ball Club* v. *National League*, 259 U. S. 200; *Hart* v. *B. F. Keith Vaudeville Exchange*, 12 F. (2d) 341 (C. C. A. 2nd, 1926), cer. den. 273 U. S. 703); agents reporting credit standings to their employer in another state (*United States Fidelity and Guaranty Company* v. *Kentucky*, 231 U. S. 394), were held not to be engaged in interstate commerce.

Almost all of these cases involved continuous communication between principal and agent.

This exchange is not a publication sufficient to sustain an action for libel (*Lehner* v. *Associated Press* (Wis. 1934), 215 Wis. 254, 254 N. W. 664) or to constitute an abandonment of property rights in the news (*International News Service* v. *Associated Press*, 248 U. S. 215). Private or intracorporate exchange is not interstate commerce. See *The Pipe Line Cases*, 234 U. S. 548, 561-562; *Hopkins* v. *United States*, 171 U. S. 578, 603; *Anderson* v. *United States*, 171 U. S. 604, 612.

In *The Pipe Line Cases, supra*, the Court said, in holding that the Uncle Sam Oil Company, having a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two, was not engaged in interstate commerce (p. 562):

> "It would be a *perversion of language*, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all, we do not regard it as falling within the description of the act, *the transportation being merely an incident to use at the end.*"

Thus it would be a still greater perversion of language to say that The Associated Press in communicating with itself is engaged in interstate commerce, for it does not even own the facilities for transportation, as was the case with the Uncle Sam Oil Company.*

Nor does the communication or exchange of news with other news agencies, being purely incidental to the private exchange with members, necessarily constitute interstate

* The "leased wires" or special service contracts of the AP with the communication companies, such as the telephone company, are "just the same as you contracting for taking advantage of one of their rates for long distance telephone calls" (R. 185).

commerce. The case of *International Textbook Company* v. *Pigg*, 217 U. S. 91, relied upon by the court below as indicating that the exchange of news is interstate commerce, is clearly distinguishable. There a correspondence school, engaged in the constant interstate transmission of books, apparatus and papers for a profit, was in effect selling such commodities to the public, and was consequently held to be engaged in interstate commerce. See also to a similar effect *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U. S. 268, 276.

But whether the AP is primarily or only incidentally engaged in interstate commerce is immaterial. It is plain that all of its activities do not constitute interstate commerce and it is well settled that the regulation of so much of a business as constitutes interstate commerce can not be extended to embrace the rest. (*First Employers' Liability Cases*, 207 U. S. 463, 502; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330; *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 282 U. S. 311, 327, cf. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1.)

The functions of its editorial employees have been hereinbefore described. It is established that the business of the AP in its New York office consists of two distinct functions, namely, production and transmission. The definition given of the editorial employees is that they are the employees of the AP who are engaged exclusively in production. They have no connection with the physical transmission of news. "They are producing some elements that go into the news service of The Associated Press in its many forms" (R. 137). In this sense the analogy is exact between these employees and the employees of a manufacturing plant engaged in transforming the raw materials into the completed article. The speed of their production, the shortness of the interval between production and transmission, do not change the essen-

tial character of either function. (*Utah Power & Light Co. v. Pfost*, 286 U. S. 165.)

The famous pronouncement of Chief Justice White in the *First Employers' Liability Cases*, 207 U. S. 463, 502, is apposite:

> "It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. *To state the proposition is to refute it.* It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since *it treats the right to engage in interstate commerce as a privilege* which cannot be availed of except upon such conditions as Congress may prescribe, even althongh the conditions would be otherwise beyond the power of Congress. *It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures.*"

4. The so-called "throat, current or flow" cases, the transportation and the "strike" or anti-trust cases, lend no support to the claim that disputes between employer and employee in general industry, per se directly affect, burden or obstruct interstate commerce.

The decisions of this Court which have been advanced below in support of the Act, in its application to the relations between The Associated Press and its editorial employees, naturally fall into three separate groups. These groups may be conveniently described as (a) the "throat," "current" or "flow" of commerce cases, (b) the railroad cases, which include *Texas and New Orleans Railroad Company* v. *Brotherhood of Railway and Steamship Clerks,* 281 U. S. 548, and (c) the "strike" cases arising under the anti-trust laws.

A. *The "throat," "current" or "flow" of commerce cases.*

None of the so-called "throat" or "current" of interstate commerce cases deals with the regulation of employer-employee relations by Congress or, more specifically, with the power of Congress to compel collective bargaining and prevent the discharge of employees who are members of labor organizations. See *Swift & Co.* v. *United States,* 196 U. S. 375; *Stafford* v. *Wallace,* 258 U. S. 495; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1; and *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420.

These cases have no application whatever to the attempted regulation of The Associated Press and its relations with its editorial employees. In all of them the persons and things regulated were expressly held to be necessary instrumentalities or agencies of interstate commerce, affected with a national public interest, and therefore subject to the regula-

tions in question, which related exclusively to matters in, directly affecting, or inextricably intermingled with, interstate commerce. That is not the case with The Associated Press. Furthermore, the "flow" cases advance no new doctrine, but only hold that Congress may properly keep certain persons from obstructing or closing the avenues of commerce to other persons. Likewise, even when Congress does not act, the individual States are themselves prohibited from obstructing, burdening or discriminating against interstate commerce. *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U. S. 282; *Lemke* v. *Farmers Grain Company*, 258 U. S. 50. Thus, A may be compelled to abstain from obstructing B. By this present Act, however, the attempt is made to regulate C in order to prevent him, forsooth, from obstructing himself or permitting himself to be obstructed.

Tagg Bros. v. *United States, supra*, is the only "current of commerce" case which directly involved the power of the Federal Government to regulate personal services. But there the services were rendered to third persons, and, as the Court said (p. 438):

> "There is nothing in the nature of *monopolistic personal services* which makes it impossible to fix reasonable charges to be made therefor * * *."

Although the scope of the commerce power was not a subject of contention in the case,* the Court did state (p. 439):

> "Plaintiffs perform an indispensable *service* in the interstate commerce in live stock. They enjoy a

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* As the Court observed (p. 433):

"The plaintiffs conceded below that, being engaged in interstate commerce at public stockyards, they are subject to some regulation by Congress."

> substantial *monopoly* at the Omaha Stock Yards. They had eliminated rate competition and had substituted therefor *rates fixed by agreement among themselves, without consulting the shippers and others who pay the rates.* They had bound themselves to maintain uniform charges regardless of the differences in experience, skill and industry. The purpose of the regulation attacked is to prevent their *service* from thus becoming an undue burden upon, and obstruction of, that commerce."

The words of this Court, recently uttered in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, would seem adequately to dispose of the current of commerce cases as a precedent here. There the Court said (p. 305):

> "If the court had held that the raising of the cattle, which were involved in the *Swift & Co.* case, including the wages paid to and working conditions of the herders and others employed in the business, could be regulated by Congress, that decision and decisions holding similarly would be in point; for it is that situation, and not the one with which the court actually dealt, which here concerns us."

The work of the editorial employees in the New York office of The Associated Press in respect of news, presents, if analogy is permissible, a situation identical in legal contemplation with the work of herders in respect of cattle. For the New York office of the AP is not a "throat" through which the commerce of the country flows. No persons other than its own members are called upon to meet any part of its costs or pay for the services it renders. And important as its news-gathering activities may be, they are not in any legal sense "affected with a national public interest."

B. *The railroad cases.*

Such regulation as Congress has attempted of the relation between employer and employee on the railroads is bottomed on the fact that the railroads are the essential instrumentalities by which interstate commerce is carried on and may be compelled to furnish safe and continuous service of transportation.

The commerce power, is, of course, given its "*widest range* in dealing with railroads, which are engaged as common carriers in interstate transportation." * Where a regulation of such railroads is invalid, *a fortiori,* it would be invalid if applied to The Associated Press, a private membership corporation engaged exclusively in a private business. And yet, extensive as the power of Congress over the railroads may be, it will be seen that the regulation of the employer-employee relation on railroads has never been permitted to reach beyond (a) the removal of actual or immediately threatened obstructions to interstate transportation service, or (b) obvious measures for the promotion of the safety of such service.**

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* After defining the power of Congress to regulate commerce the Chief Justice said, while dissenting in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 376:

"And the exercise of the power, thus broadly defined, has had the *widest range* in dealing with railroads, which are engaged as common carriers in interstate transportation. As their service is vital to the nation, nothing which has a real or substantial relation to the suitable maintenance of that service, or to the discharge of the responsibilities which inhere in it, can be regarded as beyond the power of regulation. *The Shreveport Case*, 234 U. S. 342, 351; *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 478; *Colorado* v. *United States*, 271 U. S. 153, 163, 164; *N. Y. Central Securities Corp.* v. *United States*, 287 U. S. 12, 24, 25."

** It is well settled that Congress may remove actual tangible obstructions to the highways of interstate commerce by the use of force or by the more peaceable remedy of injunction. *In re Debs*, 158 U. S. 564. Up to and including the time of the decision in the *Debs* case the expres-

The constitutionality of an attempt by Congress to regulate the relationship of employer-employee was first raised in the *Employers' Liability Cases*, 207 U. S. 463, concerning the Act of June 11, 1906 (c. 3073, 34 Stat. 232) abolishing the fellow servant rule in suits involving the liability of common carriers in interstate commerce to their employees.*

The majority of the Court held the Act unconstitutional because it was not confined to railroad employees, as well as employers, while actually engaged in interstate commerce. Mr. Justice White, in delivering the majority opinion, refused to accept the contention that Congress could not regulate em-

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sion "removal of obstructions" to interstate commerce related solely to physical and tangible obstructions, such as dams or bridges across navigable streams, but never to the causes or possible causes of physical obstructions. See: *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245; *Gilman* v. *Philadelphia*, 3 Wall. 713, 724; *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518; 529-530. See also the subsequent cases of *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177; *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194; *Louisville Bridge Co.* v. *United States*, 242 U. S. 409.

It is equally well settled that Congress may insure the safety of transportation on the highways of interstate commerce. In so doing, the connection between cause and effect is not strained or tenuous but is plain on its face. Thus, in *Baltimore & Ohio Railroad* v. *Interstate Commerce Commission*, 221 U. S. 612, the Court found it "so plain as to require no elaboration" (p. 619) that the limitation of employment to sixteen consecutive hours on interstate railroads was *directly* connected with the safety of life and property in interstate transportation. So, in *Southern Railway Co.* v. *United States*, 222 U. S. 20, the Court found such a close or direct connection between the Safety Appliance Act, as amended on March 2, 1903 (c. 976, 32 Stat. 942) "as to make it *certain* that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a *real* or *substantial* sense * * * " (p. 26). See also for other authorities on the safety of interstate transportation by railroad, *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1; *Schlemmer* v. *Buffalo, Rochester and Pittsburgh Railway Company*, 205 U. S. 1; *St. Louis, Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281; and *Missouri, Kansas & Texas Railway Co.* v. *United States*, 231 U. S. 112.

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* The Attorney General argued (p. 469) that this Act, abolishing the fellow servant rule "was a natural and logical step from the Safety Appliance Act" and that both acts must stand or fall together. The railroads argued that "Congress has no more power to define the liability of common carriers, engaged in interstate commerce, to their employes, than it has power to legislate on the domestic relations of merchants engaged in interstate commerce." (pp. 479-480, 491)

ployer-employee relations under *any* circumstances. He went on to hold the Act invalid in its entirety, however, for the reason that, not being confined to transactions in interstate commerce, *"it regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce"* (p. 497).

Shortly thereafter, in *Adair* v. *United States,* 208 U. S. 161, Section 10 of the Erdman Act of June 1, 1898 (c. 370, 30 Stat. 424) making it a criminal offense for an interstate carrier or agent thereof to discharge or discriminate against an employee because of his membership in a labor union, was held unconstitutional. It did not "prescribe rules by which such commerce must be governed" (p. 177). Regulations as to safety appliances and, even, the liability of interstate carriers for injuries to their employees in interstate commerce, were distinguished as having *on their face* direct reference to the conduct of interstate commerce. Then it was pertinently said (p. 178):

> "But what possible legal or logical connection is there between an employe's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, *in itself* and in the eye of the law, any bearing upon the commerce with which the employe is connected by his labor and services. Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of its members as wage-earners—an object entirely legitimate and to be commended rather than condemned. But surely those associations as labor organizations have nothing to do with interstate commerce as such."

The majority of the Court refused to sustain the Act as intended to prevent labor unions from obstructing commerce, saying (pp. 179-180):

> "Will it be said that the provision in question had its origin in the apprehension, on the part of Congress, that, if it did not show more consideration for members of labor organizations than for wage-earners who were not members of such organizations, or if it did not insert in the statute some such provision as the one here in question, members of labor organizations would, by illegal or violent measures, interrupt or impair the freedom of commerce among the States? We will not indulge in any such conjectures, nor make them, in whole or in part, the basis of our decision. We could not do so consistently with the respect due to a co-ordinate department of the Government * * *.
>
> Looking alone at the words of the statute for the purpose of ascertaining its scope and effect, and of determining its validity, we hold that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part. If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ in the conduct of its interstate business *only* members of labor organizations, or *only* those who are *not* members of such organizations—a power which could not be recognized as existing under the Constitution of the United States. No such rule of criminal liability as that to which we have referred can be regarded as,

in any just sense, a regulation of interstate commerce."*

In the second Employers' Liability Cases (*Mondou* v. *N. Y., N. H. & H. R. Co.*, 223 U. S. 1) the Act of 1908, as amended by the Act of April 5, 1910 (c. 143, 36 Stat. 291), was upheld because it related solely to injuries of railroad employees while actually engaged in interstate commerce. The Court emphasized the fact that railroad employees, engaged in interstate commerce, are themselves instrumentalities of such commerce, saying (p. 47):

> "Among the *instruments and agents* to which the power extends are the railroads over which transportation from one State to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employes.
>
> The duties of common carriers in respect of the safety of their employes, while both are engaged in commerce among the States, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power."

Wilson v. *New*, 243 U. S. 332, is of particular interest because it marks the uttermost limits of congressional power

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* Mr. Justice Holmes dissented on the ground that labor unions are as directly connected with the railroad business as are safety couplers. He was of the opinion that Congress could prescribe complete unionization of railroad employees if it wanted to. If Congress indeed had this power, then the exercise of the power to a more limited extent, that is by preventing discrimination against unions, was not regarded by him as a denial of due process.

over the employment relationship.* There the Adamson Act of September 1916 (c. 436, 39 Stat. 721) was upheld in so far as it provided for a permanent eight hour standard for work of railroad employees engaged in interstate commerce and a temporary standard of wages, during the period of an emergency caused by a threatened nation-wide strike on the part of railroad employees.

Mr. Chief Justice White, writing for the majority, carefully explained why the emergency made it possible, as well as absolutely necessary, to encroach temporarily upon the "primarily private" right (p. 347) of railroads engaged in public business. He said in part, after illustrating the scope of the power to regulate railroads (pp. 349-351):

> "Clear also is it that an obligation rests upon a carrier to carry on its business and that conditions of cost or other obstacles afford no excuse and exempt from no responsibility which arises from a failure to do so and also that government possesses the full regulatory power to compel performance of such duty. * * * What would be the value of the right to a reasonable rate if all movement in interstate commerce could be stopped as a result of a mere dispute between the parties or their failure to exert a primary private right concerning a matter of interstate commerce? Again, what purpose would be subserved by all the regulations established to secure the enjoyment by the public of an efficient and reasonable service, if there was no power in government to prevent all service from being destroyed? * * * And finally, to

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* That this decision represents the border line of the law today, as well as then, has been expressly acknowledged by this Court on many occasions. See, for example, *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 544; *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 369.

what derision would it not reduce the proposition that government had power to enforce the duty of operation, if that power did not extend to doing that which was essential to prevent operation from being completely stopped by filling the interregnum created by an absence of a conventional standard of wages because of a dispute on that subject between the employers and employees by a legislative standard binding on employers and employees for such a time as might be deemed by the legislature reasonably adequate to enable normal conditions to come about as the result of agreements as to wages between the parties?"

Could anything be more clear than that the mere circumstance of engaging in interstate commerce, if it be a fact, is not decisive; but that the two all important and decisive considerations are (1) the *affirmative duty* on the part of both employer and employee to render the public reasonable transportation service and (2) the obviously direct connection between the attempted regulation and the performance of that affirmative duty? The answer, if there be need for one, is found in subsequent decisions of this Court.

Thus, the decision of *Texas & New Orleans Railroad Company* v. *Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, which has been relied on so heavily by the proponents of the National Labor Relations Act,* and even by the Court below (R. 442-444), has no bearing whatever on the power of Congress to enforce collective bargaining or compel the reinstatement of discharged employees in a private busi-

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* See "Memorandum for the National Labor Relations Board," in which the Solicitor General joined in the petition for certiorari herein, at pp. 2, 3, 4, 6, 9, 10.

ness, such as that conducted by The Associated Press. On the contrary, the opinion, as its background, facts and precise language show, deals solely with the power of Congress to set up machinery for mediation or voluntary arbitration as a means of combating disruptions of vital interstate transportation *service* which result from temporary and abnormal maladjustment of the relations between public carriers for hire and their employees, both of whom are under an affirmative duty to furnish the public with reasonable and continuous interstate transportation service.

Congress had provided the machinery for voluntary arbitration of disputes between interstate carriers and their employees several years before the Pullman strike of 1894 and the decision of *In re Debs*, 158 U. S. 564,* which forcibly illustrated to the country the need for some Governmental intervention in order to preserve the very existence, as well as operation, of the necessary instrumentalities of interstate commerce. It was not until after the World War, however, that this Court considered the power of the Federal Govern-

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* Prior to the decision of *In re Debs* the Act of October 1, 1888 (25 Stat. 501) was enacted providing for the creation of "boards of arbitration or commissions for settling controversies and differences between railroad corporations and other common carriers engaged in interstate and Territorial transportation of property or passengers and their employees." The Act applied "whenever differences or controversies arise * * * which differences or controversies may hinder, impede, obstruct, interrupt or affect such transportation of property or passengers" if both parties agree to submit to arbitration, was entirely voluntary. Not only was it necessary for both parties voluntarily to submit the controversy for arbitration, but the only power conferred upon the arbitrators was that they were permitted to file their decision with the Commissioner of Labor "who shall make such decision public as soon as the same shall have been received by him."

No effort was made to prevent the Pullman strike by resorting to the machinery set up by this Act of 1888. After the strike, however, President Cleveland appointed a commission under the Act to investigate its cause. (See "Governmental Protection of Labor's Right to Organize," National Labor Relations Board, Division of Economic Research, Bulletin No. 1 (August, 1936) at pp. 35-6.)

ment to encourage arbitration or mediation of disputes between interstate railroads and their employees.*

The first case involving voluntary arbitration was *Pennsylvania Railroad Company* v. *Labor Board*, 261 U. S. 72, in which Title III of the Transportation Act of 1920 (c. 91, 41 Stat. 456, 469) was construed. In holding that the action of the Board in publishing its decision, not being compulsory, violated no legal or equitable right of the complaining company, the Court said (p. 85):

> *"The statute does not require the Railway Company to recognize or to deal with, or confer with labor unions.* It does not require employees to deal with their employers through their fellow employees. But we think it does vest the Labor Board with power to decide how such representatives ought to be chosen with a view to securing a satisfactory cooperation and *leaves it to the two sides to accept or reject the decision.*"

In *Pennsylvania R. R. System, etc.* v. *Pennsylvania R. R. Co.*, 267 U. S. 203, this Court again held that the statute imposed no legal obligation upon the company and that, consequently, the union was not entitled to the injunction therein sought by it. Referring to the obvious efforts of the rail-

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* Although the Erdman Act, of which Section 10 was declared invalid in *Adair* v. *U. S.*, 208 U. S. 161 (pp. 52-54, *supra*), provided for voluntary arbitration, replaced the Railroad Labor Disputes Act of 1888, and was even known as the Labor Disputes Act of 1898, Mr. Justice McKenna was the only member of the Court who considered that the principle of voluntary arbitration was involved in the *Adair Case* (208 U. S. at p. 184). The majority of the Court was of a contrary opinion.

The Erdman Act was replaced by the Newlands Act of 1913 (c. 6, 38 Stat. 103) which in turn gave way to Title III of the Transportation Act of 1920 (c. 91, 41 Stat. 456, 469). All these acts were designed in some way or other to encourage voluntary conciliation, mediation, or arbitration of disputes between interstate railroads and their employees. See also the Adamson Act of 1916, discussed pp. 54-56, *supra*.

road to avoid compliance with the judgment and principles published by the Labor Board, the Court stated (p. 217):

> "All these things it might do and remain within its strict legal rights after it came fully into control of its railroad property subsequent to September 1, 1920."

After the last decision, Congress passed the Railway Labor Act of May 20, 1926 (c. 347, 44 Stat. 577), also providing a plan for amicable adjustment and voluntary arbitration of disputes between common carriers and their employees. In *Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U. S. 548, it was held that the Act of 1926, unlike its predecessor, imposed certain definite obligations enforceable by judicial proceedings, the "outstanding feature" being the provision for an enforceable award (p. 564).

Subdivision 3 of Section 2 of the Act provided that "representatives, *for the purposes of this Act* [i.e., for the purposes of voluntary arbitration], shall be designated by the respective parties * * * without interference, influence, or coercion exercised by either party over the self organization or designation of representatives by the other."

This provision was upheld as forming an integral part of the arbitration scheme which Congress had devised in the exercise of its power to "facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation" (p. 570).* The reinstatement of employees discharged during a pending controversy was re-

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* The Act was not attacked as beyond the scope of the commerce power. The only grounds of the railroad's objection were that the Act (p. 558):

> "is unconstitutional because it seeks to take away an inherent and inalienable right in violation of the First and Fifth Amendments of the Federal Constitution; that the granting of the injunction was prohibited by Section 20 of the Clayton Act * * *."

quired, however, not in obedience to any express mandate of the Act, but to purge the railroad of a contempt of the Court's injunction.

The case does not overrule or weaken the *Adair* case. On the contrary, the doctrine of the *Adair* case was recognized by the Court in pointing out that its principle was inapplicable, because the enforcement of voluntary arbitration had nothing to do with the *"normal"* right of an employer to discharge his employees at will.* By "the *normal* exercise of the right of the carrier to select its employees or to discharge them" (p. 571), the Court obviously referred to the discharge or selection of employees (1) when there was no actual dispute, (2) when there was no controversy pending before a mediation board, and (3) when the discharge was not in flagrant disobedience of an injunction properly issued by court of equity.

The decision in *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330, referred to the fact that the *Texas* case, as pointed out therein, did not interfere with "normal" rights (p. 369). Furthermore, the Railroad Pension case leaves no doubt about the limited application of the *Texas* case, as well as all cases sustaining the power of Congress to influence or control the relation of employer and employee in any manner. This limited application is conclusively shown, not only by the majority opinion, but also by the dissenting opinion of the Chief Justice.

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* The Chief Justice carefully stated that the principle declared in *Adair* v. *United States*, 208 U. S. 161 and *Coppage* v. *Kansas*, 236 U. S. 1, was inapplicable because (p. 571):

> "The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees *or to discharge them. The statute is not aimed at this right of the employers* but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selections [for the purpose of voluntary arbitration], they cannot complain of the statute on constitutional grounds."

In holding that a compulsory pension plan for all employees of interstate railroads, though concededly tending to foster a contented mind on the part of such employees, is not "in any just sense a regulation of interstate transportation," this Court doomed the National Labor Relations Act, whether it embraces all employees or only those engaged in commerce. A contented mind on the part of all railroad employees would of course lead in the long run to fewer strikes or other interruptions of transportation service. Indeed no evidence is necessary to establish this fact, whereas it requires a great amount of evidence, and more than is now available, to establish the fact that the compulsory enforcement of collective bargaining would create sufficient contentment among employees to reduce labor disputes to any substantial decree.* Moreover, compulsory collective bargaining could not, in any event, affect transportation service except where persons engaged in furnishing such service are concerned.

The decision of this Court in the Railway Pension Case stands for the proposition, therefore, that even as to the railroads any compulsory control by Congress of employer-employee relations, no matter what it may be, is void unless it has "* * * *an obvious and direct bearing on the obligations of public service incident to the calling of the*

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* The claim that experience with compulsory collective bargaining demonstrates that it lessens labor disputes and tends to foster content among employees is, at best, an arguable claim, supported by evidence of little or no probative force. (See third paragraph of Section 1 of the National Labor Relations Act; "Governmental Protection of Labor's Right to Organize", National Labor Relations Board, Division of Economic Research, Bulletin No. 1 (August, 1936); and Board's Exhibit 13 (R. 341)). The evidence is not only *ex parte*, prepared by the proponents of the Act with a view to proving a doubtful point, but it is also inadequate. It places slight emphasis on other causes or on intervening causes; it fails utterly to distinguish between different industries, between unorganized and organized workers, or between overreaching employers and those who are more public spirited. Finally, this evidence completely ignores the fact, as the daily newspapers show, that strikes are quite as frequent in organized as in unorganized trades.

railroads" (p. 369). The regulation is too remotely connected with transportation service if it merely relates to the causes of disruptions, such as, for example, the malcontent of the persons rendering the service. To have a direct affect upon interstate commerce the regulation of the employment relation must at least, as was the case with the Railway Labor Act of 1926, " * * * *facilitate the amicable settlement of disputes which threatened the service* of the necessary agencies of interstate transportation [and] tended to prevent interruptions of service * * *" (*Id.*). In other words, the dispute must be actual, not conjectural; the disruption of transportation service must be presently threatened thereby, not remotely possible.

Although the four dissenting Justices disagreed with the necessity of an interruption of service, immediately threatened, they apparently agreed with the proposition that the regulation must relate directly to the adequacy of transportation service to the public. For, as the Chief Justice said, in writing the dissenting opinion (p. 376):

> "And the exercise of the [commerce] power, thus broadly defined, has had the *widest range in dealing with railroads,* which are engaged as common carriers in interstate transportation. As their service is vital to the nation, nothing which has a real or substantial relation to the suitable maintenance of that service, or to the discharge of the responsibilities which inhere in it, can be regarded as beyond the power of regulation."

C. *The "strike" or anti-trust cases.*

Without exception, the cases, considered thus far, consistently show that Congress may only regulate labor relations, or employer-employee relations, where such regu-

lation has a direct bearing upon the *service* rendered to the public by the public agencies or instrumentalities of interstate commerce.

All of the strike cases, following the second *Coronado* case (*Coronado Coal Co.* v. *United Mine Workers*), 268 U. S. 295, related exclusively to the removal of existing, intentional obstructions to interstate commerce; the injunctions were not granted except where the actual intent or purpose of the strikers was to prevent the flow of goods across state lines.* The same is true as to the regulation of any combination or conspiracy under the anti-trust laws. For this reason the strike cases do not properly fall into the category of regulations of the employer-employee relationship, but relate solely to the removal of actual and existing obstructions to interstate commerce in the form of a combination or conspiracy in restraint of trade.

As in the "flow" of commerce cases, heretofore discussed, it should be noted that the "strike" cases involve a regulation of A in order to keep him from obstructing B or depriving him of the facilities to which he is entitled. There is no indication whatever in them that an employer may be regulated to keep him from obstructing himself. On the contrary, an employer in private business is as free to discontinue interstate commerce as he is to continue. This right, it would seem, is protected by the due process clause of the Fifth Amendment as well as by the commerce clause.

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* See *In re Debs*, 158 U. S. 564; *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344; *United Leather Workers* v. *Herkert and Meisel Trunk Co.*, 265 U. S. 457, 471; *Industrial Association* v. *United States*, 268 U. S. 64, 82; *Bedford Cut Stone Co.* v. *Stone Cutters Ass'n*, 274 U. S. 37, 46-47; *Duplex Co.* v. *Deering*, 254 U. S. 443; *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, 107; *Schechter Corp.* v. *United States*, 295 U. S. 495, 547.

POINT III.

The Act violates the Fifth Amendment and is void because its terms are arbitrary, unreasonable and capricious, having no real and substantial relation to the accomplishment of legitimate ends.

On the question of due process, the end alone can not justify the means. The power may be admitted, the end may be assumed to be presently popular, ultimately desirable, and even legitimate both as to scope and as to subject matter, and yet the means, if arbitrary, must be held invalid. Thus, even if we assume, *arguendo,* that the end sought by the National Labor Relations Act is not the improvement of labor conditions in industry, but, as declared therein, is that of promoting and preserving the continuity of interstate commerce, and even if we likewise assume that such an end is within the competency of Congress, nevertheless, if the means adopted are "unreasonable, arbitrary or capricious," having no real and substantial relation to this declared object, they cannot be legally enforced. This is unquestionably the mandate of the Fifth Amendment.*

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* This dual test of the legitimacy of the end and the reasonableness of the means is applicable wherever the protection of the due process clause of the Fifth or Fourteenth Amendment is invoked. Thus in *Chicago, Burlington & Quincy Railway* v. *Drainage Commissioners*, 200 U. S. 561, 593, the Court says:

> "If the means employed have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt."

Other, more recent, expressions are in *Railroad Retirement Board* v. *Alton R. R. Co.*, 295 U. S. 330, 347; *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 311; *Nebbia* v. *New York*, 291 U. S. 502, 525. See also the dissenting opinion of Mr. Chief Justice Hughes in *Morehead* v. *Tipaldo* (New York Minimum Wage Law), 298 U. S. 587, 631, where he said that the due process clause had not been violated because "The end is legitimate and the means appropriate."

As the Court said in *Nebbia* v. *New York*, 291 U. S. 502, at page 525:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the *admitted* power, by securing that the end shall be accomplished by *methods* consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

It will be contended no doubt by the Board that the reasonableness of the entire Act is not involved in this case; that the only justiciable issue here presented is the naked one, whether The Associated Press can be compelled to reemploy and make reparation to Morris Watson for having discharged him allegedly in violation of Sections 8(1) and 8(3).

It is solely by resorting to the entire scheme of the Act, however, that the purported function of Sections 8(1) and 8(3) becomes apparent. One then perceives that the order, made pursuant to subdivisions (1) and (3) of Section 8, is but a cog in the machinery designed by the Act for using the compulsory process of government to force dissenters to swallow a drastic concept of the so-called rights of employees broadly proclaimed in Section 7 of the Act.

The order of the Board thus brings the entire Act into view. The most that can be argued by the Board is that the discharge of Morris Watson by The Associated Press was unlawful because Watson was a prominent member of a labor organization, claiming to be the exclusive representative, for the purpose of compulsory collective bargaining, of all the editorial employees in the New York office of The Associated Press.* And if the Board has any power whatsoever to compel The Associated Press to reinstate Watson with the payment of lost wages, that power must be bottomed, of necessity, upon the greater power of compelling The Associated Press to accept, and not interfere with, that self-organization and collective bargaining on the part of its editorial employees, which the Act prescribes.

Nor can "self-organization" be segregated from "collective bargaining," for it is indeed an empty phrase unless it includes collective bargaining. These terms, moreover, though not precisely synonymous, are used interchangeably and conjunctively throughout the Act as indispensable adjuncts to "collective action." And, as will be subsequently shown, the legislative scheme for protecting both leads inevitably to the closed union shop.

The Act recognizes but one type of representative for the purpose of collective bargaining, namely, the independent labor organization, completely free from employer domination, interference, or any form of support (Section 8 (2)).

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* If it can be said that the record reveals any discrimination at all against Watson in discharging him, it must be on the theory that his discharge was due to his demands for collective bargaining, rather than his membership in the American Newspaper Guild. He had been associated with the Guild for two years prior to his discharge with the knowledge of his employer (R. 194-199, 249). Indeed, the only possible argument that the discharge was discriminatory in any way must be based entirely upon the circumstantial fact that Watson was discharged the day after a letter demanding collective bargaining had been sent to The Associated Press (R. 230, 233-234).

The Company union and the closed non-union shop are thus unconditionally outlawed, while the closed union shop is expressly permitted (Section 8 (3)). The right of employees to self-organization necessarily imports the right of the employee to bargain collectively through the independent labor organization which is formed.* Compelling the employer to permit and not interfere, even by active support, with the self-organization of his employees, likewise coerces him to accept the independent labor organization as the representative of his employees. True, the Act does not in terms impose the closed union shop on the unwilling employer. But as the Court pointed out in *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 248, unionizing the workers is but the first step toward the closed shop "followed by the latter almost as a matter of course." And, as the Court went on to say,

> "Plaintiff [the employer] *is as much entitled to prevent the first step as the second,* so far as its own employees are concerned, and to be protected against irreparable injury resulting from either." (*Id.*)

Accordingly, the order of the National Labor Relations Board directing The Associated Press to reinstate Morris Watson, with back pay, cannot be enforced unless (1) that self-organization and that collective bargaining, which the Act seeks to promote, may be properly forced upon an unwilling employer and his non-consenting employees by governmental fiat, and (2) not even then, unless the methods of enforcement, including the order to reinstate Watson are reasonable, necessary, and not arbitrary.

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* Indeed, the charter of the American Newspaper Guild provides that the Guild is the exclusive representative of its members (R. 353).

1. The enforcement by statutory compulsion of the collective action which the Act prescribes is an arbitrary encroachment upon the constitutional rights of the unwilling employer and his non-consenting employees.

A. *Exceptional circumstances being absent, the statutory compulsion is arbitrary per se.*

There are rights which have no material or numerical measure. Such rights, perhaps the most notable of all being freedom of contract, are generally immune, in a free country, at least, from any governmental inference, limitation, or disturbance. Thus it is well settled that, although there is no absolute liberty to do as one wills, freedom of contract is the rule and restraint the exception; that in the absence of exceptional circumstances, the power of the individual to bargain, when exercised freely and openly by employer and employee in private business, may not be disturbed or limited by the exercise of force. *Morehead* v. *New York ex rel Tipaldo,* 298 U. S. 587, 610-611; *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522, 534; *Adkins* v. *Children's Hospital,* 261 U. S. 525, 545-546; *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 250-251, 253; *Wilson* v. *New,* 243 U. S. 332, 347, 386; *Coppage* v. *Kansas,* 236 U. S. 1, 16-21; *Adair* v. *United States,* 208 U. S. 161, 172-176; *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589-590; *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746, 762, 764-765.

Those exceptional circumstances which might justify an encroachment upon freedom of contract are, of course, varied. Broadly speaking, however, regulation of the right to contract in respect of a private business, is arbitrary and therefore void unless confined to the exigencies of a real emergency (*Wilson* v. *New,* 243 U. S. 332; *Block* v. *Hirsh,* 256 U. S. 135; *Highland* v. *Russell Car & Snow Plow Co.,* 279

U. S. 253); or to the relief of some unusual or extraordinary distress or physical danger, limited to peculiar circumstances (*Nebbia* v. *New York*, 291 U. S. 502; *Bunting* v. *Oregon*, 243 U. S. 426; *Muller* v. *Oregon*, 208 U. S. 412; *Holden* v. *Hardy*, 169 U. S. 366); or to the prevention of fraudulent or unfair practices (*Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *McLean* v. *Arkansas*, 211 U. S. 539; *Schmidinger* v. *Chicago*, 226 U. S. 578; *Petersen Baking Co.* v. *Bryan*, 290 U. S. 570; *Armour & Co.* v. *North Dakota*, 240 U. S. 510; *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539. See also *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corporation; Pep Boys, Manny, Moe & Jack of California* v. *Pyroil Sales Company, Inc.*, both decided December 7, 1936, in support of the fair trade acts of Illinois and California, respectively).

As there can be no fixed category of exceptional circumstances, so there is no fixed category of contracts or businesses which, by their very nature, involve a surrender of personal liberty in the interest of public service.* Such businesses, long described as "affected with a public interest," generally involve some element of monopoly. Due to circumstances peculiar to each, private freedom has succumbed to the public interest. See, for example, *Texas & New Orleans Railroad Company* v. *Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548; *Chicago, Burlington and Quincy Railroad Company* v. *McGuire*, 219 U. S. 549; *Wilson* v. *New*, 243 U. S. 332; *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389; *O'Gorman & Young* v. *Hartford Insurance Co.*, 282 U. S. 251; *Tagg Bros. and Moorhead* v. *United States*, 280 U. S. 420; *Munn* v. *Illinois*, 94 U. S. 113, and similar cases.

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* On occasion the exceptional circumstance may be found in the contract itself. For example, seamen's contracts of employment are regarded as exceptional in that, by their very nature they require a surrender of personal liberty for the life of the contract. See *Robertson* v. *Baldwin*, 165 U. S. 275; *Patterson* v. *Bark Eudora*, 190 U. S. 169.

That there is no clear line of demarcation between circumstances which are exceptional and those which are not, or between that business which is private and that which is public, is wholly irrelevant here. It is sufficient that *all* industrial or commercial employment is not exceptional and that *all* business is not public. The Act, in enforcing Section 7, does not even pretend to establish or follow a distinction between public and private business, between public and private employment, or, even, between ordinary and exceptional circumstances of employment. The Act, as previously observed, is addressed to all employment in industrial and commercial enterprises; it embraces, indiscriminately, the small independent employer as well as the large organized employer, the charitably inclined, as well as the over-reaching employer. It is not restricted to any unusual contracts of employment or any particular abuse of employment. Nor is a temporary emergency asserted or relied upon as the occasion for the exercise of extraordinary power; no immediately threatened disruption of the continuity of business in a particular situation is made a condition precedent to the application of Section 8 of the Act. On the contrary, the Act declares and pursues a permanent policy of drastically enforcing the rights proclaimed in Section 7 by outlawing all private and individual bargaining in respect of private employment in private industry.

The need (if need there be) for government protection of collective action on the part of employees is not in itself an exceptional circumstance which will justify an invasion of the normal right to property and liberty of contract. This was squarely decided in *Adair* v. *United States,* 208 U. S. 161. In holding that Congress could not, consistently with the Fifth Amendment, make it a criminal offence for an employer to discharge an employee because of his membership in a

labor organization, the Court in that case proclaimed (pp. 174-175):

"While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, *for whatever reason*, is the same as the right of the employer, *for whatever reason*, to dispense with the services of such employé. It was the *legal right* of the defendant, Adair,—however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so,—however unwise such a course on his part might have been,—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

The Court, after citing a number of cases in accord with the general holding expressed above, then said (p. 176):

> "And the defendant was at liberty, in his discretion, to discharge Coppage from service without giving any reason for so doing."

The *Adair* case is not only precisely in point, but its authority has never been questioned by this Court. On the contrary, when a similar situation under State law arose in *Coppage* v. *Kansas*, 236 U. S. 1, the doctrine of the *Adair* case was reaffirmed and held indistinguishable, although the broad police power of the State was invoked, and although the legality of a "yellow dog" contract, rather than discharge, was the immediate question presented. In following the *Adair* case, the Court elaborated at some length on liberty of contract between employer and employee, saying in part (pp. 17-18):

> "And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. * * *
>
> And since a state may not strike them down directly, it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is

> broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty."

The Court went on to say (p. 19):

> "* * * Conceding the full right of the individual to join the union, he has no inherent right to do this and still remain in the employ of one who is unwilling to employ a union man, any more than the same individual has a right to join the union without the consent of that organization."

Again, in *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, the Court held that, as a working man is free to join the union, so the employer is free (regardless of the wisdom or justice of his action) to employ those only who have no union affiliations. Upholding the right of the employer to maintain a closed non-union shop without interference from outside sources, the Court declared (p. 253):

> "* * * It is a sufficient answer, in law, to repeat that plaintiff had a *legal and constitutional* right to exclude union men from its employ."

Even where preservation of the continuous operation of a business, declared to be affected with a public interest, demands the exercise of statutory compulsion in labor relations, such compulsion is invalid. It is not within the functions of government to compel employer and employee to submit differences between them to arbitration and abide by the award resulting therefrom. Nor is it material whether the dispute be one as to wages (*Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522) or one as to hours (*Wolff Packing Co.* v. *Industrial Court,* 267 U. S. 552).

In holding invalid the regulation of wages by compulsory arbitration even though continuity in an essential business would concededly result therefrom, Mr. Chief Justice Taft, speaking for a unanimous Court in the first *Wolff* case, said (262 U. S. at p. 543):

> "The power of a legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon. A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public. It is true that if operation is impossible without continuous loss, *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U. S. 396; *Bullock* v. *Railroad Commission*, 254 U. S. 513, it may give up its franchise and enterprise, but short of this, it must continue. Not so the owner when by mere changed conditions his business becomes clothed with a public interest. He may stop at will whether the business be losing or profitable."

And, as Mr. Justice Van Devanter stated in writing the subsequent decision of the unanimous Court to the effect that compulsory arbitration as to hours of labor was equally invalid (267 U. S. at p. 569):

> "The authority which the Act gives respecting the fixing of hours of labor is merely a feature of the system of compulsory arbitration and has no separate purpose. It was exerted by the state agency as a part of that system and the state court sustained its exertion as such. As a part of the system it shares the invalidity of the whole."

Thus this Court has squarely held, on more than one occasion, that the protection of labor's right to collective action (*Adair, Coppage and Hitchman* cases) and the preservation of the continuous operation of essential businesses (*Wolff* cases) do not justify governmental interference with the voluntary character of the relation and contract between employer and employee. Such interference, it would seem, is an arbitrary and unreasonable method of preventing strikes or other labor disputes, although limited to particular situations where the need of forceful intervention was found to be more than ordinary. That the National Labor Relations Act is arbitrary and invalid in so far as it attempts to subjugate private contract and property rights to the rights of collective action, set forth in Section 7, should require no further demonstration.

The confusion between compulsory collective bargaining and voluntary arbitration is deliberately fostered by the proponents of the National Labor Relations Act, but, on analysis, it reveals how hopelessly contradictory the evidence in favor of collective bargaining is.* Thus it is declared in Section 1 of the Act and frequently has been asserted that "Experience has

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* In Bulletin No. 1 of the National Labor Relations Board, Division of Economic Research (August 1936), entitled "Governmental Protection of Labor's Right to Organize", it is stated in regard to the 1934 amendments to the Railway Labor Act at p. 50:

> "By these amendments the United States Board of Mediation, which consisted of five members, was abolished, and the present National Mediation Board of three created (R. 169).
>
> The *latter* has *some* duties very similar to those of the National Labor Relations Board. It settles disputes between employees regarding representation for the purpose of collective bargaining, and, when requested to do so, conducts elections and certifies to the employer the names of the duly designated representatives. * * *
>
> Disputes over the designation of employee representatives could be handled by the *old* United States Mediation Board, only by *agreement of the parties*. In the 6 years of the Board's existence there were but nine instances in which the employers consented to the determina-

proved that *protection by law* of the right of employees to organize and bargain collectively safeguards commerce * * *." Experience has proved no such thing. Except, possibly, during the war time regimentation of industry, there had been no experience in this country with government protected (i. e.,—compulsory) collective bargaining prior to 1933.* Up

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tion of employee representatives by an election conducted by the Board. *To avoid the strikes threatened by the resulting dissatisfaction*, the 1934 amendments included a provision empowering the new Board to investigate all such disputes, and to determine the choice of the majority of the employees."

The above statement is indeed strange in view of the Board's position, taken throughout the bulletin, that experience with collective bargaining under the Act of 1926 conclusively demonstrates that governmental enforcement of collective bargaining prevents strikes. Thus, for example, see the following excerpts from page 26 of the bulletin:

> "Q. * * * Now, Dr. Leiserson, in terms of the actual experience upon the railways since 1926, * * * has actual experience demonstrated that the protection of this right (to organize and bargain collectively) by congressional action in the 1926 Railway Labor Act made collective action on the railways an instrument of peace rather than strife?
>
> "A. There is no question about that, and the carriers as well as the employees would so testify. There is no question that the experience since 1926, and since the amended act of 1934, bears out the purpose that Congress had in mind of maintaining peace through these methods of promoting good will, I should say" (R. 208-209).

The only conclusion to be drawn from excerpts such as these is that the Board's Bulletin No. 1 adds nothing to the "findings" of the preamble (Section 1), but merely illustrates how questionable and unfounded in fact the broad conclusions of Congress happen to be.

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* The history of federal labor legislation up to and including the Railway Labor Act of 1926 has already been discussed at some length, pages 50-62. None of these acts, except possibly the Erdman Act, which was declared invalid in *Adair* v. *United States*, 208 U. S. 161 (pp. 52-54, *supra*), involved compulsory unionization or collective bargaining. The first attempt, aside from the Erdman Act, at permanent federal statutory enforcement of collective bargaining and unionization of employees, appears in the 1934 amendments to the Railway Labor Act (48 Stat. 1186). The Norris-LaGuardia Anti-Injunction Act (47 Stat. 70) merely recognises voluntary collective bargaining and self-organization of employees; but does not purport to enforce them. Since the "New Deal", compulsory collective bargaining and unionization of employees, has been provided for in a number of statutes. See, for example, the National Industrial Recovery Act (48 Stat. 195, 198) and the Guffey Coal Conservation Act (49 Stat. 991, 1001). But, it is submitted, this sponsorship of compulsory collective bargaining within the last four years does not prove that it has been tested by experience or that it is constitutional.

to that time, our experience had been confined to (1) government protected voluntary arbitration of labor disputes between interstate railroads and their employees, and (2) voluntary collective bargaining and self-organization without government protection in certain specialized industries.

The Associated Press readily concedes that the results of voluntary arbitration and voluntary collective action in certain industries may have had beneficial results. Certainly there is no need here for questioning the results or for impeaching the evidence on this point because it is wholly irrelevant. For, as the Court wisely observed in *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 250:

> "Whatever may be the advantages of 'collective bargaining,' *it is not bargaining at all, in any just sense, unless it is voluntary on both sides.*"

B. *The particular collective action which the Act seeks to impose is arbitrary, unreasonable and unduly restrictive of constitutional rights.*

As we have seen, the mere enforcement of collective action by compulsion, exceptional circumstances being absent, constitutes, in itself, an arbitrary encroachment upon important constitutional rights. The Act even goes beyond the compulsory enforcement of collective action in general in that it is designed to compel the universal acceptance, by both employer and employee, of a rigid and hitherto unaccepted conception of collective action which, carried to its logical conclusion, completely destroys the rights of the employer and his non-consenting employees. Instead of seeking a reasonable balance between employer rights and the rights of individual employees on the one hand, and the collective rights of employees on the other, the Act fosters the domination of all

industry by labor unions. This domination is sought, irrespective of harsh, one-sided, and discriminatory results, as the one and only method of adjusting inequality of bargaining between employer and employee. That such an arbitrary program has been adopted by the Act would seem to be apparent from no more than a cursory consideration of the provisions of Sections 8 and 9 of the Act.

Section 8, it will be remembered, lists the "unfair labor practices" of the "*employer.*" Subdivision (1) contains the general, catch-all prohibition declaring it to "be an unfair labor practice for an *employer*—(1) To interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7." It is to be noted that no one but the employer is enjoined from engaging in this sweeping definition of an unfair labor practice. Any outsiders, including labor unions, are free "to interfere with, restrain, or coerce employees" in the exercise of their collective rights. This and other practices on the part of the employees themselves, the labor organizations, and the officials of such organizations, are either ignored completely or sanctioned by silence. Indeed, as hereafter shown, the subsequent, more specific provisions, of the Act expressly permit specialized forms of coercion and discrimination against employees such as the "closed shop."

(a) *The Closed Union Shop*

The Act deliberately and openly fosters the closed union shop. This is done first, by generally prohibiting the employer from taking any action against the unionization of his employees by an outside labor union (Section 8 (1)); second, by preventing the employer from establishing a "company union" or otherwise aiding, advising, supporting, or cooperating with his employees in the collective action taken by them (Section 8 (2)); third, by preventing any discrimination against employees by reason of their affiliations with

an outside union (Section 8 (3)); fourth, by expressly permitting discrimination against employees in accordance with a closed union shop agreement (Section 8 (3)); fifth, by providing that the only appropriate unit for the purpose of collective bargaining shall be that determined by the Board (Section 9 (b)); sixth, by providing that the representatives selected by the majority of the employees in that one unit shall be the exclusive representatives for the entire unit; and seventh, by compelling the employer to "bargain" with the representative for the entire unit as thus selected (Section 8 (5)). These various requirements and prohibitions, as will be shown, not only lead inevitably to the closed union shop but they are also arbitrary in themselves.

(b) *Outlawing the Company Union*

Subdivision (2) of Section 8 of the Act makes it unlawful for the *employer* "To dominate or interfere with the formation or administration of *any* labor organization or contribute financial *or other support* to it: *Provided,* That *subject to rules and regulations made and published by the Board* pursuant to Section 6 (a), an employer shall not be prohibited from *permitting employees to confer with him* during working hours without loss of time or pay."

Thereby the "company union" or any other employer-employee cooperation is outlawed. Antagonism between the employer and his employee, between capital and labor, is outrightly encouraged. The unreasoning sweep of the prohibition in Section 8 (2) is merely emphasized by the proviso that the employer may *confer* with his employees during working hours "subject to rules and regulations made and published by the Board," but not otherwise.

That employers may be supposed in extreme and exceptional cases to have encouraged company unions as a means of

domineering over their employees and preventing outsiders from intervening in aid of the employees is not, it would seem, sufficient reason for outlawing the company union *in toto*, much less for prohibiting an employer from conferring with his employee except in accordance with rules and regulations. Irrespective of whether or not the company union is inherently evil, it would seem on principle alone that no law could remain reasonable and at the same time deprive both employer and employee of the advantages of friendship, mutual loyalty and wise cooperation.

(c) *The Preferred Status of Union Employees*

Subdivision (3) of Section 8 deprives the *employer* of the right "by discrimination in regard to *hire* or *tenure* of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *." Thus the Act reenacts those very restrictions upon the employer which were declared arbitrary and invalid in the *Adair* and *Coppage* cases. The prohibition here, moreover, extends to *tenure* of employment as well as to any discrimination in hire, discharge, or employment contracts. Accordingly, an employer must always find reasons which would safely withstand the scrutiny of the Board before he even went so far as to demote, reduce the salary, or even change the routine employment of a union man. By the same token, it would seem that he must carefully examine his conscience and his records before he promotes or encourages a non-union man. These provisions against discrimination contained in Section 8 (3) virtually place union members in a status secure against discharge or demotion however deserved. See *H. B. Rosenthal-Ettlinger Co.* v. *Schlossberg*, 266 N. Y. Supp. 762 (Sup. Ct. N. Y. 1933).

(d) *Express Sanction of Discriminatory Closed Union Shop Agreements*

Although Section 8 (1) of the Act purports to prevent the employer from interfering in any way with the rights of employees, the proviso in Section 8 (3) expressly permits this discrimination if it is carried out in accordance with the closed union shop agreement. Section 8 (3), after proscribing any discrimination against union members, goes on to say: "*Provided,* That *nothing in this Act,* or in the National Industrial Recovery Act (U. S. C., Supp. VII, Title 15, Secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, *shall preclude an employer from making an agreement with a labor organization* (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) *to require as a condition of employment membership therein,* if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made."

Thus, discrimination against collective action, self-organization, as well as the individual rights, of the minority employees is expressly permitted by the employer if he has the consent of a labor union representing the majority employees. The employer may cooperate with one outside labor union in discriminating against another labor union, equally independent. Likewise the representative of the employees, determined in accordance with the provisions of Section 9, may discriminate against any employer unit, craft unit, plant unit or any subdivision thereof or against any individual employee. The closed union shop which the Act openly encourages is, by its very nature, discrimination against individual employees and minority units of employees.

Nor is the discrimination lessened in any way by the fact that subdivision (3) of the section does not in terms impose the closed shop upon the employer without his consent. It is common knowledge that the dominant union will almost inevitably seek to compel the employer to enter into a closed shop agreement. This, it would seem, is primarily a matter of time. That is to say, the Act, instead of directly compelling the unwilling employer to accept the closed shop, leaves the manner of compulsion entirely to the discretion of the dominant union. It should be remembered that the Act expressly sanctions, the right to strike and, indeed, prevents any interference with it "in any way." (Section 13).

(e) *The Arbitrary Restrictions Upon Collective Bargaining Units and Representatives*

The Act does not permit freedom in collective bargaining by employees. On the contrary, collective bargaining is prohibited except upon rigid conditions which are both restrictive and discriminatory. We have already seen that the "company union" or any other unit which is subject to employer advice, influence, or support, has been outlawed by the Act (Section 8 (2)). It is not, therefore, a proper unit or representative for the purpose of collective bargaining. Furthermore, the individual employee is prevented from independently selecting the bargaining unit to which he desires to belong and, even, from choosing his representative for the purpose of collective bargaining. There can be but one recognized bargaining unit and that unit may have only one representative. The individual employee can have little, if any, influence in selecting either. The employer can have no influence whatever.

The only permissible bargaining unit is the one selected as appropriate by the Board, whether it be "the employer unit,

craft unit, plant unit, or subdivision thereof" (Section 9 (b)). The Board's discretion in making this selection is virtually unlimited, for it need only be made "in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act" (Section 9 (b)). *"Implicit* in the power to determine the unit appropriate for the purposes of collective bargaining *is the power to gerrymander and thereby to aggrandize or crush a labor organization."* See *Bendix Products Corporation* v. *Beman,* (N. D. Ill. 1936) 14 F. Supp. 58, 66. The employer and the individual employees are utterly helpless except insofar as they are able to influence the Board in the exercise of its unlimited power of discrimination.

The selection of the unit appropriate for the purposes of collective bargaining is, however, of the utmost concern to both employee and employer, particularly because there can be but one, *"exclusive,"* representative for the entire unit. Section 9 (a) provides that *"representatives* designated or selected for the purposes of collective bargaining by the *majority* of the employees in a unit appropriate for such purposes, shall be the *exclusive representatives of all the employees in such unit* for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." Obviously the minority employees in a unit selected by the Board are completely deprived of their right to contract with their employer either individually or through representatives of their own choosing. Conversely, the employer is stripped of any right to contract with the minority employees within the unit. True, there is an express proviso in Section 9(a) "that any individual employee or a group of employees shall have the right at any time *to present grievances* to their employer." This tenuous right of peti-

tion, however, is all he has left * and it is hardly an adequate substitute for the right of property and freedom of contract which has been taken from him. Nor can the employer find, in the privilege of hearing the grievances of his employees, adequate compensation for his former right of contracting and bargaining with them in respect of all matters pertaining to their employment.

Furthermore, the minority in the designated unit is not only deprived of the power to contract with their employer, either individually or through representatives of their own choosing, but they are also *bound by the terms of any agreement which the employer makes with the representatives of the majority.*

As to the reasonableness of such a requirement this Court said, but recently, in *Carter* v. *Carter Coal Company,* 298 U. S., 238, 311:

> "The power [to fix hours and wages] conferred upon the majority [of producers and of miners] is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business * * *.
>
> And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this

* The proviso, or exception from the power, marks, according to the well settled rules of construction, the limits of the power itself. *Gibbons* v. *Ogden,* 9 Wheat. 1, 191.

court which foreclose the question. *Schechter Corp.* v. *United States*, 295 U. S. at p. 537; *Eubank* v. *Richmond*, 226 U. S. 137, 143; *Washington ex rel. Seattle Trust Co.* v. *Roberge*, 278 U. S. 116, 121-122."

The deprivation of constitutional rights effected by this Act is even more intolerable and unconstitutional than the deprivation resulting from the collective bargaining provisions of the Guffey Act, for under this Act it is possible, either by gerrymandering of bargaining units, or by rulings on elections, *to subject the majority employees to the will of the minority.*

It is manifest that a majority of the employees of a given employer might easily be deprived of any right to representation should the Board reject the employer unit and establish another unit or units, dominated by other groups or other interests, as the only proper units. By the same token the majority of employees in a craft or plant or subdivision thereof might be deprived of their right to bargain. The Board has openly followed the policy of always favoring the unit which is supported by an independent labor organization.*

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* See Comment on decisions of National Labor Relations Board for its first year, 4 University of Chicago Law Review, 97 (December, 1936), where it states at pp. 102-103:

"In its determinations of appropriate bargaining units the Board has tacitly given prime consideration to the rules of the interested existing bona fide labor organizations governing eligibility to membership as to tasks performed. Wherever there has been a conflict between a bona fide labor organization and an employer, or between a bona fide labor organization and a labor organization which the Board suspects of being a company union, *the Board has always decided in favor of the bargaining unit supported by the bona fide labor organization.* In cases of conflict between two bona fide labor organizations both of which form a part of the American Federation of Labor, the Board has declined to pass on the question of a bargaining unit, saying that the two unions should have recourse to their parent organization for a decision on the conflict of jurisdiction (*In re Aluminum Co. of America*, R. 4, Dec. 41; *In re Axton-Fisher Tobacco Co.*, R. 5, Dec. 48; *In re Standard Oil Co. of California*, XXI. R. 3, Dec. 49). A more difficult problem which may present itself in connection with the drive for industrial unions would require the Board to choose between the industrial form of organization and the craft form, without being able to send the problem back to a common parent organization for decision."

The majority may similarly be deprived of its right to bargain where the Board designates as the proper representative for the unit the representative selected pursuant to secret ballot in which all the employees did not vote. Indeed, in a related case the Board designated the American Newspaper Guild as the exclusive representative of all editorial employees in the New York office for the purpose of collective bargaining.* Thus the majority of the editorial employees of the Associated Press, in its New York office, are without representatives for the purpose of collective bargaining and yet The Associated Press is under statutory compulsion to "bargain" with the American Newspaper Guild as the exclusive representative for that unit.

(f) *Compulsory Unilateral Bargaining*

Section 8 (5) of the Act provides that it is an unfair labor practice for the employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." The Board has interpreted this as imposing upon the employer an affirmative duty to bargain and negotiate with the exclusive representatives of the unit which it prescribes. The employer need not, it is true, accept unreasonable proposals made by the representatives but he must at least submit counter-proposals and be prepared to give an adequate reason for his refusal. The Board, of

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* Pursuant to Section 9(c) of the Act the Board took a secret ballot of the editorial employees in the New York office of the Associated Press. All the editorial employees did not vote but a majority did. Of this majority which voted, a majority (being a minority of the whole) chose the American Newspaper Guild as its representative for the purposes of collective bargaining. The Board accordingly decided, citing *Virginia Ry. Co.* v. *System Federation No. 40*, 84 F. (2d) 641 (C. C. A. 4th, 1936), that the American Newspaper Guild was the exclusive representative of all the editorial employees in the New York office of the Associated Press. See Decision No. 58 of the Board in Case No. R. 26 (July 3, 1936).

course, is the final arbiter as to whether the refusal is reasonable or unreasonable.* Thus, when a labor organization, such as the American Newspaper Guild, demands a closed shop, the employer may not flatly refuse; but must seek to reach an agreement with the union.** And, in the final analysis, it is left to the Board to determine for the employer whether or not the closed shop demand of the union is to be accepted.

The Board may not determine, however, that the *union* must accept a reasonable offer or that it shall be bound, should it ever reach an agreement with the employer. Mutuality of contract is totally lacking in that the employer, who is the only party under an obligation to "bargain", is likewise the sole party bound by an agreement. The employees are not bound by force of any provision in the Act (which specifically preserves the right to strike); nor are they bound as a matter of contract, since they may refuse to work from the instant a "bargain" is reached. Thus, the Act imposes upon the

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* The Board has already rendered a number of decisions to the effect that the employer must do everything within reason to reach an agreement with the collective bargaining representatives. See *In re Timken Silent Automatic Co.*, C. 10, Decision No. 25; *In re Canton Enameling & Stamping Co.*, C. 47, Dec. 31; *In re Edward E. Cox, Printer*, C. 37, Dec. 45; *In re Sands Mfg. Co.*, C. 33, Dec. 46; *In re Jeffrey-Dewitt Insulator Co.*, C. 21, Dec. 50; *In re Consumers' Research, Inc.*, C. 52, Dec. 85; *In re International Filter Co.*, C. 56 and R. 21, Dec. 40; *In re Alaska Juneau Co.*, C. 91, Dec. 94. These decisions are now collected in Commerce Clearing House, Labor Law Service, pp. 15,401 *et seq.* and in Prentice-Hall, Inc., Labor and Unemployment Insurance Service, pars. 14,601 *et seq.*

In this regard it is interesting to note that the Trial Examiner in his intermediate report recommended that The Associated Press be compelled, in the negative, to "cease and desist from refusing to bargain collectively with the American Newspaper Guild" and, in the affirmative, to "bargain collectively with its editorial employees through the American Newspaper Guild and its National Executive Board, duly chosen representative of the Associated Press unit of such Guild," and, finally, that the Associated Press "file with the Labor Board for the Second Region a report in writing *setting forth in detail* the *manner* and *form* in which it has *complied* with the foregoing requirements" (R. 44-45).

** See *In re International Filter Co.*, C. 56, R. 21, Dec. 40; *In re Alaska Juneau Co.*, C. 91, Dec. 94, for decisions of the Board holding that the employer must even "bargain" in regard to a demand for the closed shop.

employer strict affirmative duties without reciprocal advantage. If the public has a legitimate interest in requiring the employer to bargain with the representatives of his employees, it would seem that it has an equally legitimate interest in requiring the representatives to bargain with the employer and to be bound by any contract agreed upon. It is submitted that whatever may be the merits or demerits of compulsory unionization and compulsory collective bargaining, they can never be accomplished within reason unless employer, employee and employee representatives are all placed under mutual obligation.

The "collective bargain" which the Act commands is nothing more than "compulsory unilateral arbitration." See *Bendix Products Corp* v. *Beman,* 14 F. Supp. 58 (N. D. Ill. 1936). The employer is, in effect, compelled to arbitrate any dispute with the representative of his employees and abide by the award. The employees and their representatives are under no obligation whatever to bargain, arbitrate or abide by the terms of an award. This "compulsory unilateral arbitration" is, therefore, much more arbitrary than the compulsory mutual arbitration unanimously declared invalid in *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522 and 267 U. S. 552.

(g) *Recapitulation*

It would seem to be fully demonstrated that the Act does not seek to protect collective bargaining and collective action on the part of employees but that it unquestionably attempts to place all labor relations in an iron vise by reducing employment to a closed union shop basis. This is shown not only by express sanction of closed union shop agreements (Section 8 (3)) but by the requirement that the employer must bargain (Section 8 (5)) with the representatives of the unit selected

by the Board (Section 9 (b)), who, though having the power to bind or exclude all (Section 9 (a)), may not in fact represent the interests of all the employees in such unit.

The order of the Board directing The Associated Press to reinstate Morris Watson with the payment of lost wages because of alleged unfair labor practices in violation of Sections 8(1) and 8(3) of the Act can not be enforced unless the entire policy of the Act of enforcing union control of private enterprise is to be sustained. If The Associated Press may be compelled to reinstate and continue the employment of an editorial employee solely because he happens to be a member of the labor union, The Associated Press and its other editorial employees would be deprived of their first and last defense against the arbitrary, capricious union-domination to which the Act would subject them.

2. The methods of enforcement which the Act adopts are themselves arbitrary and unreasonably intrusive.

Besides being coercive and discriminatory, the Act is also invalid because the machinery for enforcement which it provides violates the established canons of due process of law. The special rights of labor and of labor unions, which the Act attempts to create, are not enforceable in the courts by the ordinary legal or equitable processes applicable to other rights; but, instead, the enforcement of those rights is placed almost exclusively in the hands of the Board created by Congress for that express purpose.

A. *The intrusive and unlimited power conferred upon the Board.*

The Board, as noted hereinbefore, is given broad power to prevent any employer from engaging in the "unfair labor

practices" set forth in Section 8 of the Act (Section 10 (a)). To this end the Board may entertain any charges and issue complaints based thereon; and in the resulting proceeding "the rules of evidence prevailing in courts of law or equity shall not be controlling" (Section 10(b)). If, after hearing testimony, the Board is of "the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, *and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.* Such order may further require such person *to make reports from time to time* showing the extent to which it has complied with the order" (Section 10(c)). The Board must petition the appropriate Circuit Court of Appeals for the enforcement of such orders, but "The findings of the Board as to the facts, if supported by evidence, shall be conclusive" (Section 10 (e)).*

Thus the Board is given extensive powers of inquiry and coercion within the field of personal relations and its findings as to the merits are conclusive. In all this, it should be remembered, "the rules of evidence prevailing in courts of law or equity shall not be controlling." Sufficient illustration of the total disregard of the ordinary rules of logic and of evidence may be found in the record of this very case.

The Board obviously went too far in finding that The Associated Press had committed an unfair labor practice in

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* Additional inquisitorial powers, not involved in this proceeding, are granted the Board in Section 11 of the Act.

discharging Morris Watson. The testimony as to the causes of Watson's discharge, most of it being from the lips of Watson himself, is primarily hearsay and opinion evidence. Where Watson was given important work to do, the Board accepted this as proof of his capability but, where he was given less important work, the Board concluded that he had been punished (R. 424-429). Indeed the Board had no difficulty in finding that changes in Watson's assignments constituted punishment for his union activities, although his work was much the same thereafter, and although he suffered no deduction in pay (R. 427, 218, 219). The Board even went so far as to find as an incontrovertible fact that Watson was discharged "to discourage membership" in the American Newspaper Guild (R. 430). It completely ignored the fact that, to the knowledge of the AP, he had been a prominent member of the Guild for two years prior to his discharge (R. 249, 194-199); that, according to the AP records, there were at least five distinct reasons for Watson's discharge which had been advanced by his immediate superior (R. 251); that he was discharged on the sole ground that he was not performing according to his proven capabilities (R. 251); and, as the record repeatedly shows, that Watson's attitude towards The Associated Press had been openly hostile for a long time prior to his discharge (R. 250, 198-199). Even assuming for the sake of argument, that Watson's union activities within and without the office may have been one of the contributing causes for his discharge, the evidence still shows that there were other causes amply sufficient to justify his dismissal.

Finally, the Board concluded that the discharge was discriminatory because other editorial employees, fearing similar reprisals, resigned from the Guild. Such a conclusion was plainly inconsistent with the testimony of the Board's own witness, one Hippelheuser, a personal friend of Watson's, an editorial employee in the New York office, and a prominent

member in the Guild ever since its inception.* He said no steps had been taken against him, that he was in good standing with the AP, and that there were "no uncomfortable relationships whatsoever" (R. 244).

The record in this case would seem, therefore, fully to substantiate the fact that the Act confers upon the Board unprecedented power to delve into the private affairs of individuals and private corporations. And in exercising this intrusive and arbitrary power the Board, not being subject to the established rules of procedure and evidence, obviously threatens employers constantly with unnecessary annoyance and irreparable injury.

Manifestly these broad inquisitorial powers of the Board (when exercised in conjunction with the power of the Board to gerrymander bargaining units, designate representatives for the purposes of collective bargaining and actually compel the employer to "bargain collectively") constitute an intolerable interference with the right of employers to manage the internal affairs of their private enterprises. Interferences with the right to management, far less extensive in scope, have long been regarded as inconsistent with fundamental rights.**

This was emphasized by the Court in *Wilson* v. *New*, 243 U. S. 332, 347, where, even in regard to public carriers, it said:

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* This is the testimony which he gave (R. 244):

"Q. You are in perfectly good standing up to now at the Associated Press in your employment? A. I suppose so.

Q. Under no charges or complaints or anything? A. I must say that there has never been any step directed against me of any kind.

Q. There are no uncomfortable relationships whatsoever? A. No."

** See for example: *Wilson* v. *New*, 243 U. S. 332, 347, 386; *Adams* v. *Tanner*, 244 U. S. 590; *Truax* v. *Corrigan*, 257 U. S. 312, 338; *Tyson & Bro.* v. *Banton*, 273 U. S. 418; *Wolff Co.* v. *Industrial Court*, 262 U. S. 522; *Southwestern Bell Tel. Co.* v. *Public Service Commission*, 262 U. S. 276, 289.

> "It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is *primarily private,* the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority."

B. *The power to compel employers to reinstate discharged employees with back pay violates the Seventh Amendment as well as the Fifth Amendment to the Constitution.*

One of the most arbitrary of all the unreasonable provisions of this Act is the provision in Section 10(c) giving the Board the power "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." Penalizing the discharge of an employee is, in itself, so arbitrary that it violates due process of law. *Adair* v. *United States,* 208 U. S. 161, *Coppage* v. *Kansas,* 236 U. S. 1. This provision, however, is more drastic than the penalties considered in the *Adair* and *Coppage* cases; for here the employer (1) must not only reinstate in his personal service, and maintain in that service, a person whom he is unwilling to employ, but (2) he is compelled to pay money damages without resort to a trial by jury.

It has long been a maxim of courts of equity that contracts of personal service will not be specifically enforced. The reason for this has been the recognition that compulsory personal service is not only intolerable but that it is seldom satisfactory from the point of view of either party. It is true that in *Texas & New Orleans Railroad* v. *Railway & Steamship Clerks,* 281 U. S. 548, reinstatement of employees, discharged in defiance of an injunction, was ordered as a proper method of purging the railroad of contempt. That was an

unusual situation where the court deemed such extreme action necessary in order to restore the *status quo*. It does not follow that legislation may supersede court action. Yet this, in substance, is what Section 10(c) attempts to accomplish.

Here the AP must employ a person whom it *does* not want, not to restore the *status quo* but perhaps to perpetuate it. Neither the subject matter, the terms, nor the duration of the contract are of its own choosing. The AP must refrain from employing other persons more to its liking in order to leave room for Watson, or may even be compelled to discharge some non-union editorial employee in order to make room for Watson. And, presumably, the Board will maintain a constant surveillance over Watson and the AP, if he is reinstated, to be sure that he has been reinstated "to his former position, without prejudice to any rights or privileges previously enjoyed by him" (Board's Order, R. 433).

Circuit Judge Wilbur, in an opinion which has just been handed down by the Ninth Circuit Court of Appeals (January 11, 1937) in *National Labor Relations Board* v. *Mackay Radio and Telegraph Company*, emphasized and declared invalid, "as government by injunction," many of these arbitrary features of the Act. In so doing, he took particular issue with the decision of the Court below in this case, stating:

> "Can we join the Circuit Court of Appeals of the Second Circuit in saying that the employer remains the 'Master of the operation of his business,' when he has lost the power to control his employees? The employees are cemented into their position not because of fidelity to their employer but because of fidelity to a labor organization. It was said long ago that 'A man cannot serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other.' (Matt. 6:27.)
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> * * * * *

> Is it not clear that by the National Labor Relations Act, and its practical operation the federal government has assumed control of the business of the employer in one of its most vital features, namely, the tenure of its employees' jobs?"

It would seem that, even if the discharge of Morris Watson were wrongful, the proper and only reasonable reparation would be to permit Watson to sue in a court of law for the damages caused him. The order of reinstatement, however, would not only compel The Associated Press unwillingly to accept and pay for the personal services of Morris Watson at the rate in force at the time of his discharge, but it also grants Watson, without jury trial, an award of money damages in excess of $2,000 (R. 433). This it would seem is done in flagrant violation of the Seventh Amendment which guarantees the right to trial by jury.

Judge Wilbur in the *Mackay Radio and Telegraph* case, *supra*, further held that the order of the Board, requiring the payment of wages during the period of unemployment, violated the Seventh Amendment. He said:

> "An action for damages for a wrongful discharge of an employee is a form of action known to the common law and well within the right to a trial by jury as known at common law. Hence the Act, so far as it authorizes the Board to assess damages without the intervention of a jury, is unconstitutional (see discussion of corresponding provisions of the Interstate Commerce Act as first enacted in 1887 [24 Stat. 379], before its amendment in 1888 [25 Stat. 855]; *Western N. Y. & P. R. Co.* v. *Penn. Refining Co.*, 137 Fed. 343, 349. See also, 12 C. J. 131, §193)."

POINT IV.

The Act, in its application to The Associated Press, violates the First Amendment to the Constitution which guarantees to citizens freedom of speech and freedom of the press.

This case does not involve those employees of The Associated Press who are engaged in mechanical or commercial activities. As already emphasized, it relates exclusively to the relation between The Associated Press and its editorial employees. Even if the Act could be constitutionally applied to employers engaged in trade or production, even if it were valid as applied to The Associated Press and its employees engaged in the mechanical transmission of news, it is still submitted that the Act, as applied to The Associated Press and its editorial employees, violates the First Amendment to the Constitution.

The Associated Press, as its name denotes, is in substance the press itself. As heretofore shown, The Associated Press is a membership corporation consisting solely of those persons who actually own and operate the newspapers of the country. Only owners of newspapers are eligible for membership (Board Ex. 4, By-Laws, Art. I, Art. II, Sec. 1). The Associated Press is engaged in obtaining and procuring information and intelligence, by its own means, by exchange and otherwise, for the use and benefit of its members and the furnishing and supplying of the same to them for publication in the newspapers which they own (Board Ex. 4, Certificate of Incorporation). Each member is entitled to receive a news service, which he shall take and publish regularly in the newspaper specified in the member's certificate of membership, and he is enjoined from using the news received by him for any other purpose (Board Ex. 4, By-Laws, Art. VII, Secs.

2 and 5, Art. VIII, Sec. 3). Each member shall also furnish to the Association all the news of the member's district, the area of which is determined by the Board of Directors (Board Ex. 4, By-Laws, Art. VIII, Secs. 3 and 4). There are more than 1300 members of The Associated Press, representing morning, evening and Sunday newspapers, in all important cities and towns in the United States. It is stated in a document offered in evidence by the Board (Board Ex. 9, p. 3):

> "The membership of The Associated Press includes persons of *every conceivable political, economic and religious advocacy.* The *one* thing upon which they are united, so far as *The Associated Press* news service is concerned, is that it *shall be wholly free from partisan activity, or even the expression of any opinion whatever.* The service is intended to be limited to *the reporting of events without bias.* To this end the news service is intentionally and necessarily subjected to the criticism of its fifteen directors, its more than 1,300 members and indeed the reading public. *It is the theory of the organization that, in a self-governing country like ours, the citizens, if given the facts, must be able to form their own opinions respecting them.*"

Impartiality and freedom from any bias is the fundamental aim, the *sine qua non,* of The Associated Press. And largely through its efforts, this is also the aim of the American Press at large.

The Associated Press collects items of news, which are delivered to its various offices and there read and edited by its editorial staff, and thereafter whatever news has been selected for transmission to members is sent to the newspapers of the country for publication by them.

Morris Watson, it will be remembered, was employed as one of the editorial staff of The Associated Press in its New York office. He prepared or received news reports, edited or

rewrote the news items and then delivered them to a filing editor for further revision, and if found by the latter to be appropriate, they were sent out over the public communication lines to the members. Watson was discharged, as shown by the records of the AP, "solely on the grounds of his work not being on a basis for which he has shown capability" (R. 251). It has been found that he was discharged because of union activities and, although he was concededly competent at some time before his discharge, it has not been found that Watson was qualified for the position he occupied at the time of his discharge. Indeed, we submit that only his employer is in a position to determine his qualifications as an editorial employee.

The Labor Board now decrees that The Associated Press and its officers and agents shall "(a) offer to Morris Watson immediate and full reinstatement *to his former position*, without prejudice to the rights and privileges previously enjoyed by him, (b) make whole said Morris Watson for any loss of pay which he has suffered by reason of his discharge * * *" (R. 433). That is to say, that Watson must be reemployed by The Associated Press, against its will, as an editorial worker in compiling and editing news for publication in American newspapers. This is ordered irrespective of his present capacity or qualification or his acceptability by his employer, and irrespective of whatever bias he may have acquired by reason of his discharge.

It is asserted as the basis of jurisdiction in this case that the question of Watson's discharge and reinstatement is a matter directly affecting the interstate commerce activities of The Associated Press and that, as Congress may regulate those interstate activities, so it must necessarily have the power to regulate any matters which directly affect them. The sole basis for jurisdiction in regard to Watson's employment must, therefore, stand or fall upon the power of Con-

gress to regulate the activities in which The Associated Press is engaged. That is to say, the order to reinstate Watson presupposes, and is wholly dependent upon, the power to regulate the gathering, production, and dissemination of news for the American press. News and intelligence is, in disregard of the First Amendment to the Constitution, treated as an ordinary article of commerce, subject to Federal supervision and control. Logically, and on principle alone, the National Labor Relations Act, as applied to The Associated Press, is thus an infringement upon that freedom of expression which is the essence of free speech and of a free press.

Furthermore, the National Labor Relations Act, as applied to The Associated Press in this case, actually destroys the independence of the press of this country. Can freedom and independence of the press be maintained if a Federal bureau may dictate to the American newspapers the persons they employ to prepare their news reports? How can impartiality and independence of reporting be maintained under such a system of administrative supervision? How can accuracy, independence and impartiality survive a deliberate attempt by the Government to impose upon The Associated Press a requirement that its news editors be union men?

As we have seen, interference with the internal management of any private concern is inconsistent with due process of law. Where, however, the private concern is not dealing in ordinary commercial commodities but is engaged exclusively in the formulation and dissemination of news for the press, such interference is still more intolerable in that it constitutes *an encroachment upon the management and policy of the press itself*. Whenever a union editorial employee of The Associated Press is discharged, a case is at once made for the Labor Board by the claim, whether rightly or not, that membership in a labor organization has been discouraged or that the employee has been discriminated against. The ques-

tion of editorial personnel then becomes a question for the Board to determine. And the management of the editorial affairs of this great news service of the American Press, in the gathering and preparation of news, is displaced by the Labor Board which Congress has created.

It is submitted that The Associated Press cannot freely perform the functions delegated to it by its 1300 newspaper members if its selection of news writers and other editorial employees is to be subject to such control by the Labor Board. From the point of view of The Associated Press, the purposes of the Act make fundamentally inoperative and impossible the maintenance of that independence necessary to deliver an unbiased news report to the American newspapers, and we regard it as self-evident that it is the management of The Associated Press, and the management alone, that is in a position to determine whether an employee's work, his character or his prejudices should permit him to become or to remain an employee of the organization.

Freedom of the press and freedom of speech, as guaranteed by the First Amendment, means more than freedom from censorship by government; it means that freedom of expression must be jealously protected from any form of governmental control or influence. That any direct or indirect limitation upon the press of the country by Federal or State legislation can not be countenanced in this free country, has been vigorously and eloquently proclaimed by this Court on more than one occasion. For a profound discussion of the historical background of the First Amendment and the time-honored principles which brought it into being, see *Near* v. *Minnesota*, 283 U. S. 697.*

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* For general discussions of the fundamental rights of freedom of speech and the press, see also: *Gitlow* v. *New York*, 268 U. S. 652, 666, 667; *Whitney* v. *California*, 274 U. S. 357, 371, 372, 373-378; *Stromberg* v. *California*, 283 U. S. 359, 368, 369.

Freedom of expression, it would seem, is as precious as either due process or the equal protection of law. In the recent case of *Grosjean* v. *American Press Co. Inc.*, 297 U. S. 233, this Court declared the Louisiana statute imposing a tax upon newspapers, enjoying a circulation of more than 25,000 copies per week, to be, in application, an unwarranted restriction of the press by Government and, for this reason alone, a violation of due process. And the Court said (p. 250):

> "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. *A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.*"

In the still more recent case of *DeJonge* v. *State of Oregon*, (decided January 4, 1937) U. S. , a state statute was declared to be an unconstitutional restraint upon freedom

of speech in so far as it authorized a particular charge against a defendant, solely because he had participated in a meeting held under the auspices of the Communist party. There having been no advocacy at the meeting of criminal syndicalism, prohibited by the State Law, the application of the statute to the defendant was held destructive of the very spirit of the First Amendment.

Likewise, in the case at bar, the National Labor Relations Act, even though it be held to apply validly to certain employments, still can not be enforced against an editorial agency of the press where so to do permits, and even commands, a Federal bureau to control and direct the employment of the persons who compose and determine the contents of the news reports upon which the nation at large relies as "the great interpreters between the Government and the people." To name the men who shall choose and write the news for publication is no different either in principle or in result from naming what shall be written or published. Here the author and the product are one and inseparable. If one is to be free, so must the other.

CONCLUSION

The order of the Court below, granting the Petition of the National Labor Relations Board for the enforcement of its order, should be reversed.

January 22, 1937.

Respectfully submitted,

JOHN W. DAVIS,
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Appendix A.

The National Labor Relations Act of July 5, 1935

(PUBLIC—No. 198—74TH CONGRESS; 49 STAT. 449; 29 U. S. C. 151)

[S. 1958]

AN ACT

To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual

liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Definitions

Sec. 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District

of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board created by section 3 of this Act.

(11) The term "old Board" means the National Labor Relations Board established by Executive Order Numbered 6763 of the President on June 29, 1934, pursuant to Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), and reestablished and continued by Executive Order Numbered 7074 of the President of June 15, 1935, pursuant to Title I of the National Industrial Recovery Act (48 Stat. 195) as amended and continued by Senate Joint Resolution 133 [1] approved June 14, 1935.

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[1] So in original.

National Labor Relations Board

SEC. 3. (a) There is hereby created a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

SEC. 4. (a) Each member of the Board shall receive a salary of $10,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint, without regard for the

provisions of the civil-service laws but subject to the Classification Act of 1923, as amended, an executive secretary, and such attorneys, examiners, and regional directors, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (or for statistical work), where such service may be obtained from the Department of Labor.

(b) Upon the appointment of the three original members of the Board and the designation of its chairman, the old Board shall cease to exist. All employees of the old Board shall be transferred to and become employees of the Board with salaries under the Classification Act of 1923, as amended, without acquiring by such transfer a permanent or civil service status. All records, papers, and property of the old Board shall become records, papers, and property of the Board, and all unexpended funds and appropriations for the use and maintenance of the old Board shall become funds and appropriations available to be expended by the Board in the exercise of the powers, authority, and duties conferred on it by this Act.

(c) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District

of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the

employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertin[1] such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the trans-

[1] So in original.

cript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such pro-

ceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any

circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for

the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. Any member

of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any District Court of the United States or the United States courts of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

LIMITATIONS

SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

SEC. 14. Wherever the application of the provisions of section 7(a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707 (a)), as amended from time to time, or of section 77 B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (l) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided,* That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

SEC. 15. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. 16. This Act may be cited as the "National Labor Relations Act."

Approved, July 5, 1935.